OPERATION OF THE EXCLUSIONARY RULE

OVERSIGHT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

OPERATION OF THE EXCLUSIONARY RULE

JUNE 2, 16, AND DECEMBER 2, 1982

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OPERATION OF THE EXCLUSIONARY RULE

WEDNESDAY, JUNE 2, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237 of the Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee), presiding.

Present: Representatives Conyers and Crockett.

Also present: Michael Ward, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. CONYERS. Good morning, the subcommittee will come to order.

Today we commence oversight hearings on the operation of the exclusionary rule as an enforcement mechanism for the fourth amendment protection against unreasonable searches and seizures. The exclusionary rule, which prohibits the use against a criminal defendant of evidence that was obtained in violation of the defendant's rights, was fashioned by the Supreme Court in 1914 in *Weeks* v. *United States.* In 1961, in *Mapp* v. *Ohio,* the Supreme Court held that the requirements of the exclusionary rule were applicable to the States by virtue of the 14th amendment.

In the years since the *Mapp* case, the exclusionary rule has been the subject of considerable criticism. It is alleged that the rule allows large numbers of criminal defendants to go free, despite evidence of guilt, and that it is an ineffective deterrent to police misconduct. The Attorney General's task force on violent crime has recommended modification of the exclusionary rule, and numerous bills have been introduced toward that end. Our purpose in these hearings is to explore the operation of the exclusionary rule, as well as its purposes, and to determine whether these criticisms are justified.

During the course of these hearings, we hope to find the answers to a number of questions. First we must assess the costs to society of the rule. Is the existence of the exclusionary rule a serious impediment to law enforcement? How frequently are cases not brought because of police misconduct? How often do suppression motions lead to the dismissal of cases against guilty defendants? What is the nature of the cases in which the exclusionary rule becomes an issue?

Second, we must examine the benefits derived from the exclusionary rule. Is it a deterrent to police misconduct? Has it promot-

ed greater concern by the police for the constitutional rights of citizens? Are there other purposes served by the rule?

Third, we must examine alternative methods of enforcing fourth amendment rights. How effective would they be? What would be the impact upon the courts, and upon criminal trials in particular, of alternative enforcement mechanisms?

Finally, we must examine the question of whether the exclusionary rule is a proper subject for legislation, or whether it is rather a constitutionally mandated rule, to be changed only by the courts or constitutional amendment.

I hope that these hearings may help us to remove the debate regarding the exclusionary rule from the arena of rhetoric, and give us the information necessary for a careful and reasoned deliberation of the issue.

We are pleased to welcome today Assistant Attorney General Lowell Jensen, now head of the Criminal Division of the Department of Justice, and formerly a district attorney. He has prepared a thoughtful statement, which will be entered into the record. We welcome you to the committee.

Good morning, sir.

TESTIMONY OF D. LOWELL JENSEN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. JENSEN. Good morning, Mr. Chairman. I appreciate this opportunity, Mr. Chairman, to appear and testify on the rule that you have alluded to, because I agree with you that it is a rule that is now a subject matter of a good deal of scrutiny.

I appreciate the fact that you have already said that we will put the testimony into the record. I am going to try to be brief because I know there are other witnesses here this morning. Perhaps we can discuss it more later.

What I have tried to do is, in effect, go over and shorten my testimony and leave out all of the citations that have been provided to the committee and counsel. As you have already stated, the rule comes about because of judicially promulgated decisions that go back to 1914, the *Weeks* case that was alluded to by you, Mr. Chairman, in your opening remarks.

As you also pointed out, it was not until 1961 that the rule was applied to the State courts. Up until that time it had been a rule for Federal courts. Before the decision in *Mapp* v. *Ohio* there had been a previous decision, in 1949, in *Wolf* v. *Colorado* where the Supreme Court had taken up exactly the same issue of whether it would be applied to the State court and decided that it would not.

The *Mapp* v. *Ohio* decision, then, in 1961, certainly reversed that. I think it is interesting to note that as of the time that *Mapp* v. *Ohio* was decided, the question of whether or not to adopt the rule had been before various State supreme courts, and in the decades following the *Weeks* decision, there had been 16 States that had adopted the rule and 31 States had refused to accept it. So that rule was made applicable to those States that had refused to accept it by *Mapp* v. *Ohio*.

What I would like to go into is not only the background of that rule, but I would like to discuss some of the cases which will illus-

trate the contemporary application of the rule and to discuss with the committee the proposed legislative changes that came about because of the consideration of the rule by the Attorney General's task force.

Before I do that, in terms of this debate, I think I would like to address some of what perhaps could be called misplaced arguments. In my opinion, there are some issues that are discussed in arguments that upon proper analysis are nonissues.

One of these nonissues relates to the impact of the rule on the crime rate. Supporters of the rule claim that advocates for modification of the present rule argue incorrectly that reforming the rule will reduce the crime rate. The fact, however, is that advocates for reform do not claim that any such change is a panacea for crime rate reduction. Any thoughtful consideration of contemporary crime must recognize, unfortunately, that there are no panaceas. On the other hand, advocates for reform do point out that the rule operates to free known murderers, robbers, drug traffickers and other violent and nonviolent offenders and that a rule of evidence which has such a result without a reasonable purpose to support it is intolerable.

Another nonissue relates to the impact of the rule on criminal cases. Supporters of the rule cite a 1979 General Accounting Office report which found that evidence was actually suppressed in only 1.3 percent of a sample of Federal criminal cases and argue that modification or abolition of the exclusionary rule is, therefore, not a significant criminal justice issue.

Aside from the inevitable analytic flaws in the GAO reports—for example, it did not consider cases not ever presented to U.S. attorneys because the law enforcement agency involved felt they presented fourth amendment problems—any commonsense perspective on the criminal justice world must take note that the exclusionary rule is a necessary consideration of every police arrest and of every seizure of physical evidence, that the rule is the overwhelming component of drug case litigation, and that the appellate court overload which faces every judicial system in this country is due in no small measure to appeals of exclusionary rule issues. The argument that, somehow, the exclusionary rule has an insignificant impact on the criminal justice process is totally disingenuous.

Discussion of the true issues pertaining to the exclusionary rule must begin with an examination of the purpose behind the rule. When the exclusionary rule was first articulated in *Weeks,* the court justified its holding on two grounds: deterrence of unlawful police conduct and maintenance of judicial integrity. In *Elkins* v. *United States,* 364 U.S. 206 (1960), the court stated the deterrence ground as follows: Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it.

The judicial integrity rationale was based on the notion that courts should be prevented from being "accomplices in the willful disobedience of a constitution they are sworn to uphold." Early exclusionary rule cases mentioned both rationales. However, over time, as the rule has been explicated, the asserted rationale of judicial integrity essentially has been abandoned.

The emergence of deterrence as the reason for the rule is aptly illustrated by the Court's opinions in fourth amendment retroactivity cases. In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Court, considering the issue for the first time, refused to apply *Mapp* v. *Ohio* retroactively. The *Linkletter* Court observed that the basis for *Mapp's* application of the exclusionary rule to the States was its finding that the rule "was the only effective deterrent to lawless police action."

Applying that premise to the *Linkletter* case, the Court noted that it "cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved." Id. at 637. Likewise, in *Desist* v. *United States,* 394 U.S. 244 (1969), the Court observed that "the exclusionary rule 'has no bearing on guilt' or the fairness of the trial." Id. Accordingly, it "declined to extend the court-made exclusionary rule to cases in which its deterrence purpose would not be served." Id.

More recently, in *United States* v. *Peltier,* 422 U.S. 531 (1975), the Court held that the policy underlying the exclusionary rule did not require the suppression of evidence seized in searches which were clearly unlawful under standards established before the trial of *Peltier* in the case of *Almeida-Sanchez,* 413 U.S. 266 (1973), but were lawful at the time they were actually carried out, which was before *Almeida-Sanchez* was decided. The Court observed that although Supreme Court decisions applying the exclusionary rule to unconstitutionally seized evidence have referred to "the imperative of judicial integrity," the Court has relied principally upon the deterrent purpose served by the exclusionary rule. The Court further noted that the lesson to be learned from the retroactivity cases is that "the 'imperative of judicial integrity' is * * * not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." Id. at 537–38. Focusing specifically on the deterrence purpose, the Court concluded that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the fourth amendment." Id. at 542.

In *Michigan* v. *DeFillippo,* 443 U.S. 31 (1979), the Court held that the rule should not be applied to exclude evidence when it has been seized during an arrest for violation of a statute valid at the time of the arrest but which is subsequently declared invalid. The Court stated:

"The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule." Id. at 38 n. 3.

The declaration in the retroactivity cases of the deterrence rationale for the exclusionary rule is also apparent in the Court's ap-

proach to determining whether the rule should be applied in a variety of other circumstances.

In *United States* v. *Calandra,* 414 U.S. 338 (1974), the Court held that a witness before a grand jury could not refuse to answer questions based on evidence obtained in violation of the fourth amendment. In that case, the Court stated that the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim. Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the fourth amendment against unreasonable searches and seizures.

In *United States* v. *Janis,* 428 U.S. 433 (1976), the Court refused to exclude from a Federal civil proceeding evidence seized unconstitutionally but in good faith by State law enforcement officers. The Court concluded that "exclusion from Federal civil proceedings of evidence unlawfully seized by a State criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the State police so that it outweighs the societal costs imposed by the exclusion." Id. at 454. Because the evidence in both *Calandra* and *Janis* had been obtained unlawfully, application of the judicial integrity rationale would have required suppression of the evidence. However, as noted above, the Court considered the deterrent purpose of the exclusionary rule as its primary rationale and concluded that the evidence should not be suppressed.

The deterrence rationale was also used as the basis of exclusionary rule analysis when the Court held that unlawfully seized evidence is admissible to impeach the defendant's testimony at his criminal trial, *United States* v. *Havens,* 446 U.S. 620 (1980) and that no person other than the defendant has standing to ask for the invocation of the exclusionary rule. See *Rakas* v. *Illinois,* 439 U.S. 128 (1978). In sum, the judicial integrity rationale has essentially been abandoned by the Court as a factor in its exclusionary rule analysis.

Problems with the rule. As the above cases demonstrate, the Court has clearly established that the true purpose behind the exclusionary rule is the deterrence of police misconduct. The heart of the problem with the exclusionary rule lies in its application: The courts have gradually expanded its application to situations in which the rule cannot possibly serve as a deterrent. This expansion has distorted the preeminent purpose of the rule with the result that the truth-finding process is impeded, and society is done a grave and unnecessary injustice.

The clearest example of misapplication of the exclusionary rule arises when courts suppress evidence seized by police in executing a duly authorized search warrant. In that type of case a second or third judge, in disagreement with the judge who issued the warrant, invalidates the search despite the absence of any police misconduct. Consider in this regard *United States* v. *Karathanos,* 531 F. 2d 26 (2d Cir. 1976). In that case, INS agents obtained a warrant to search certain business premises. The warrant was issued based on an affidavit that the magistrate found sufficient to establish probable cause that the defendant was involved in the criminal harboring of illegal aliens. The district court judge, however, disagreed with the finding of the magistrate who issued the warrant and held that probable cause had not been stated. The evidence

that had been obtained by the search was suppressed, even though the appellate court acknowledged that there was no suggestion that the agents had acted improperly either by procuring the warrant in bad faith or by making a material misrepresentation in the warrant application.

United States v. *Shorter,* 600 F. 2d 585 (6th Cir. 1979), is another example of the exclusionary rule being applied where an authorized search warrant is invalidated by a second judge or court. In that case, local police and agents of the Federal Bureau of Investigation arrested a suspected Ohio bank robber at his home. After the arrest, the FBI agent telephoned a Federal magistrate and stated his grounds for a search warrant which was then issued by the magistrate as permitted by law. The subsequent search produced incriminating evidence, including bait bills and a firearm. The trial judge ruled the search lawful, but the conviction was reversed on appeal. The appellate court decided that although the officer had in fact been placed under an oath by the magistrate which incorporated all the testimony already provided in the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the beginning of the telephone conversation violated the law because the applicable Federal rule requires that the oath be obtained immediately.

These cases involve disagreements between judges about judicial conduct—there is no police misconduct involved. The police were carrying out their duties as society expects them to do: The officers provided their information fully and honestly to the court and proceeded to carry out the orders of the court once the warrants were issued. Suppression of evidence in instances such as these does not serve the purpose of the exclusionary rule, the deterrence of police misconduct. In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules only to have the evidence suppressed on the premise that they have violated the Constitution. Proper police conduct is thereupon falsely labeled as illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear, where the law is thoroughly confused or even in situations where the cases are in flat contradiction. Police often are confronted with the questions of whether to conduct a warrantless search in the field when the circumstances they are facing are not covered by existing case law.

Last term, the U.S. Supreme Court decided two cases that aptly illustrate this point, *New York* v. *Belton,* 101 S. Ct. 2860 (1981), and *Robbins* v. *California,* 101 S. Ct. 2842 (1981). The cases are remarkably similar factually. In both cases, police officers lawfully stopped a car, smelled burnt marihuana, discovered marihuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in *Robbins,* the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marihuana. In *Belton,* the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required an analysis of the automobile exception cases which pertain to the validity of warrantless searches of cars and their contents, see, for example, *Carroll* v. *United States,* 267 U.S. 132 (1925); the doctrine of "search incident to arrest" as defined by *Chimel* v. *California,* 395 U.S. 752 (1969); and the watershed case of *United States* v. *Chadwick,* 433 U.S. 1 (1977), in which the Court held that police must obtain a warrant to open a closed container in an automobile where the possessor of the container has exhibited a reasonable expectation of privacy in that particular container.

When the Supreme Court decided *Belton* and *Robbins,* three justices opined that both searches were legal; three justices opined that they were both illegal; and three justices controlled the ultimate decision that *Robbins* was illegal and *Belton* legal. To add to the confusion, the *Robbins* search now said to be illegal had been found to be legal by the California courts and the *Belton* search now said to be legal had been found to be illegal by the New York courts.

When *Robbins* was finally decided, 14 judges had reviewed the search: 7 found it valid; 7, invalid. Now that *Robbins* and *Belton* have been decided, do we know the law which governs police conduct in similar searches? Justice Brennan offers this comment in his *Belton* dissent: "The Court does not give the police any 'bright line' answers to these questions. More important, because the Court's new rule abandons the justifications underlying *Chimel,* it offers no guidance to the police officer seeking to work out these answers for himself."

To the same end, Justice Rehnquist dissented in *Robbins* by citing the language from Justice Harlan in his concurring opinion in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971): "State and Federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an every day question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime."

Just yesterday, the U.S. Supreme Court issued an opinion that helped to resolve some of the confusion spawned by the *Chadwick* case. In this recent case, *United States* v. *Ross,* the Court overturned *Robbins* v. *California,* which it had decided only last year, and held that if probable cause justifies search of a lawfully stopped vehicle under the automobile exception to the warrant requirement, it justifies the search of every part of the vehicle and its contents, including all closed containers, that may conceal the object of the search. I have not yet had the opportunity to examine the *Ross* decision in detail, but from my reading of the case yesterday, I think that the Court's opinion will likely prove helpful in guiding police in conducting searches during highway stops.

Unfortunately, the clarification provided in *Ross* comes too late to affect the countless search and seizure cases that followed and expanded upon the *Chadwick* and *Sanders* decisions. When it acknowledged that lower courts had differed in their interpretations of those cases and that law enforcement officers needed more guidance in interpreting the law, the *Ross* Court recognized that *Chad-*

wick has spawned a great degree of confusion in both the Federal and State courts.

As we reflect upon the rule of law resident somewhere within these decisions, let us also consider an important fact which is often overlooked in exclusionary rule discussions. The search in *Robbins* actually took place on January 5, 1975, long before *Chadwick* was decided on June 21, 1977. At the very least, it is fair to say that the applicable rule at the time of the search was even more elusive at that time than it is today, and yet we have imposed the final definitive sanction of suppression of reliable, trustworthy evidence in such a situation on the assumption that this judicial act will deter police misconduct.

With respect to this typical exclusionary rule analysis, it is instructive to note that the standard to which police are held in fourth amendment cases is stricter than that to which attorneys must comply when they are judged under the sixth amendment guarantee that criminal defendants be represented by competent counsel. Consider in this regard, *People* v. *Russell,* 101 Cal. App. 3d 665 (1980), an automobile stop/closed container case decided by a California appellate court in 1980.

In *Russell,* once again there was a lawful stop, lawful opening of the car trunk, and police discovery of marihuana when they unzipped a flight bag. At trial the search was uncontested, and the defendant convicted. On appeal it was contended that his counsel at trial was incompetent under the sixth amendment when judged against the California standard announced in *People* v. *Pope,* 23 Cal. 3d 412 (1979), which requires that an appellant "show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." In support of this position, the defendant argued that counsel had not asserted that opening the flight bag required a search warrant under the requirements of *People* v. *Dalton,* 24 Cal. 3d 850 (1979), a California search and seizure case in which the court had applied the holding in *Chadwick,* supra, despite the fact that the search took place prior to the *Chadwick* decision.

The Court rejected the defendant's contention that the attorney was incompetent, stating: "It was first noted that the hearing on Russell's motion to suppress evidence occurred February 13, 1979. The opinion of *People* v. *Dalton* was filed 6 months later, August 16, 1979. It is doubtful that *Pope* requires, under pain of being held to have furnished constitutionally inadequate representation, such prescience on the part of a lawyer for one criminally accused."

Implicit in that language is a conclusion that the state of the law of search and seizure was such that a criminal defense attorney, when confronted with the issue in the courtroom, was not expected to be aware that there was a fourth amendment violation on those particular facts. Indeed, the Court found that a reasonably prepared attorney was not expected to anticipate that a future search and seizure decision, *People* v. *Dalton,* supra, would hold similar police conduct unlawful. Yet as was illustrated in the *Dalton* and *Robbins* decisions, there is no such hesitation in requiring "such prescience" on the part of police officers faced with precisely the same problem of legal analysis which confronted the attorney in *Russell.*

The consequence of applying the exclusionary rule in the cases discussed above is twofold. First, the purpose of the exclusionary rule is not served when the officers believe, in good faith, that they are performing a lawful search. When law enforcement officers obtain a warrant in good faith or when they make a reasonable, good faith attempt to predict the decisions that future courts will make, there exists no logical basis for excluding the evidence they have gathered. Applying the rule in these cases fails to further in any degree the rule's deterrent purpose, since conduct reasonably engaged in, in good faith, is by definition not susceptible to being deterred by the imposition of after-the-fact evidentiary sanctions.

Second, application of the exclusionary rule when the police have acted reasonably and in good faith results in attaching a false label to proper police conduct. This adversely affects the criminal justice system by fostering the public perception that police are engaged in lawless, improper conduct when that is simply not the case. The Supreme Court recognized these effects in *Stone* v. *Powell,* in which it stated: "The disparity in particular cases between this error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for fourth amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice."

Mr. CONYERS. Mr. Assistant Attorney General, you have acquitted yourself well here today. Thank you for your thoughtful discussion of this very troubling subject. Since we are meeting for the first time, I wanted to get an indication of how you view your responsibilities in the Department of Justice. Could you tell me a little bit about the size of the Criminal Division and its main focus?

Mr. JENSEN. Surely. The Criminal Division is essentially a Washington-based corps of assistant U.S. attorneys, Federal prosecutors, that in one sense is complementary to the criminal prosecution activities of U.S. attorneys around the country. In a sense there is a relationship to prosecution where it is shared with U.S. attorneys around the country. In some instances the Criminal Division has separate, disparate functions. One of the major functions of the Criminal Division is found in the Organized Crime Strike Forces, for example. It is directed from within the division and a majority of the lawyers in the division are assigned those responsibilities, as I am sure you are aware, Mr. Chairman. They are in place around the country at specific areas.

There is a Fraud Section within the Criminal Division that handles major multijurisdictional frauds that occur. In effect, this section takes care of all of the multinational instances that would go beyond the scope of the jurisdiction of a specific U.S. attorney. A Public Integrity Section also exists within the Criminal Division. There are various duties within this section, such as cases dealing with special prosecutors, for example, or instances where there are, unfortunately, cases of public corruption.

There is a section that deals with internal security matters such as espionage and matters of export control. Matters that are related to that kind of activity are within the specific jurisdiction of the

Division, which is broader, obviously, than most U.S. attorneys. There is a general litigation section that picks up all of the rest of it, that deals with specific cases that may overlap with U.S. attorneys in the more typical kinds of cases. There is a section that deals with narcotics, in which we deal with the major cartels of narcotic distributions that exist in this country. There are more specific sections that deal with appellate issues, with legislative issues, and also a section that deals with subject matter of international extraditions. So, the scope of the Criminal Division activities is quite broad. But its major mission is to play a role in coordination with U.S. attorneys to prosecute the Federal criminal.

Mr. CONYERS. I thank you for that description. Many people depend upon you to conduct the war against crime, at it relates to Federal matters. That is a very large responsibility, extremely complicated and I wish you well in that endeavor.

Mr. JENSEN. I appreciate your comments.

Mr. CONYERS. If there is any way we can be of assistance to you, we offer our humble services.

Mr. JENSEN. That is very much appreciated. Because as I am sure you are aware, this is a matter, as you say, of grave responsibility and a great public concern.

Mr. CONYERS. About how many persons are working under your supervision?

Mr. JENSEN. Just over 400 lawyers.

Mr. CONYERS. On the subject at hand, *Ross*, which overruled *Robbins*, said the police may open certain closed parcels in a car. This may be too soon after the decision, but where are we now? What may police officers search in a vehicle when they don't have a search warrant?

Mr. JENSEN. We are at a new definition, as far as that particular phase of search and seizure is involved. I hesitate to do instantaneous analysis but I think that the significance of the *Ross* case is that it returns to *Carroll* v. *U.S.* which was the original case that dealt with the notion of searches of automobiles and carved out a so-called exception for searches.

The impact of the *Ross* case is that if there is probable cause for the police to search the vehicle, there is also probable cause to search any container within the vehicle, and they may do so without a search warrant. With *Robbins,* the perception was that when you reach certain containers you had to go get a search warrant rather than go ahead with the search.

The *Robbins* Court felt that that was a constitutional mandate. *Ross* changes that and says that if the police who search have probable cause, and the object is a closed container within a car, the officer may go ahead and search it because of the original probable cause relating to the car.

It is still a little confusing in that there are some other cases where there were containers taken from cars and the Supreme Court in *Ross* made clear that the *Chadwick* case that I mentioned before, and a companion case, *Arkansas* v. *Sanders* that dealt with closed containers were not being changed by *Ross.* The difference was that in those cases the closed containers were known to the police before they were put in the vehicles and so there was prob-

able cause to go into those containers, that was separate and distinct from the probable cause to search the car.

So, in those instances you would have to get a search warrant. The effect of *Ross* is to make it clear that when there is probable cause to search the vehicle, as occurred in *Robbins* and *Belton* and in innumerable other searches, that now, under *Ross,* with probable cause, the officer may go ahead and search the car and its containers.

Mr. CONYERS. What does this mean in my neighborhood and yours?

Mr. JENSEN. Well, if you go back in my experience as a district attorney, one of the first cases was a case of a reported robber who had just come out of a supermarket and chased down the freeway. They stopped the stolen car, went into the trunk of the car and took out a container with the gun and money. That was held to be unlawful because they didn't get a warrant for the container. The impact of *Ross* is to change that. They had probable cause to search that car, so they could go ahead and look at containers, which means that that robber would be successfully prosecuted in my community and yours.

So, the impact of *Ross* in a situation like that gets to exactly what I am talking about, which is that those types of applications of search and seizure were to my mind missing the point. The police were acting in perfect good faith in a reasonable way. Now, I think that would be a valid search.

Mr. CONYERS. I got the impression certain members of the task force think that changing the exclusionary rule would make criminal prosecutions more effective and thereby affect the crime rate indirectly?

Mr. JENSEN. As I mentioned in my statement you have to be careful that no one wants to hold out the restatement of the exclusionary rule as a panacea for crime. We simply can't do that. To the extent that there is some perception that the argument is that now our crime rates will be dramatically reduced because of the change in the exclusionary rule, I do not think that we can say that. What we are saying is that crime rates are dependent upon specific cases. As I was mentioning, the case where the robber was not convicted as a result of that implication of the exclusionary rule, would not occur again. I think it is important when we have reliable truthful evidence that we use it in those trials. Rather than have a result where specific offenders we know are responsible for violent crimes are being freed by operation of the exclusionary rule, our suggested change would see to it that that doesn't happen.

We would have specific cases where known offenders with reliable, truthful evidence, would be convicted rather than set free. That has an impact upon the crime rate in a marginal sense. It has an impact upon the criminal justice system. So, that the argument we are putting forward is that if we are going to use the exclusionary rule, and we are saying that it ought to be retained for those purposes that are truly within its purpose, that it ought to then also be limited so that we don't use it in such a fashion that we get an intolerable result in specific cases.

Mr. CONYERS. Suppose you inadvertently bring back the old silver platter doctrine days.

Mr. JENSEN. That is the notion that there is a clearly unlawfully seized piece of evidence being introduced in one jurisdiction as opposed to another? I do not think that we are dealing with that in this instance. Since *Mapp* v. *Ohio,* we are dealing with, in effect, setting a national standard for the Federal approach, which then through *Mapp* v. *Ohio* sets a threshold for searches and seizures which are lawful or unlawful. I am saying the good faith exception or statement of the exclusionary rule would not affect that. The good faith statement of the rule would be a basic threshold for admissible evidence. It would not deal with issues where there was clearly an unlawful search other than to say it is excluded because it was that kind of search.

Mr. CONYERS. You are challenging the Supreme Court's rulemaking authority in one sense, it seems to me. How come?

Mr. JENSEN. That is the issue of whether legislation in this area is permissible. As I have said, that is a subject matter that would be in debate. The idea that in this area there ought to be rules that can be followed is one that virtually everyone accepts. The process by which those rules are made by the Supreme Court is inherent in the interpretation of the fourth amendment, but there isn't anything that says you can't have a legislative definition of that which is constitutional within the fourth amendment. The exclusionary rule is a judicially stated sanction for the fourth amendment. There isn't anything that says only the Supreme Court may be an interpreter of the Constitution. We already have, I think it is interesting to note, legislative enactments of the good faith exception or the good faith statement. So, we are already in the trap where State legislatures are confronted with the same situation we are here. State legislatures are given the same argument, that it is not within their power to make that kind of decision. Two of them have now decided that it is. In an ultimate sense obviously the U.S. Supreme Court would decide whether it is within their power. That is, I suppose, the final resting place. Our point would be that just as those State legislatures have decided that it is within their appropriate power, so could the Congress.

Mr. CONYERS. But the courts have been wrestling with this for a long time. They did not rush to judgment. Most lawyers don't really understand it. Are you sure you want to second guess the U.S. Supreme Court?

Mr. JENSEN. In a way I am not sure that we are second guessing. You could fashion a good argument that with *Peltier* and *Michigan* v. *DeFillippo* and the statements of the Court and if you read *Ross* you may very well come up with an argument that says that the true statement of the exclusionary rule is that which is urged in this testimony and by the task force.

The true statement is in *U.S.* v. *Williams,* that really what the exclusionary rule is all about is that where there is police misconduct, exclude. Where there is none, it ought not to be excluded. We are really stating the exclusionary rule itself in its proper form.

Now the question is will the Supreme Court state that? They could. It may very well be there are cases that will come before them where these issues will be there. I am sure there will be cases

that will come before them that will deal with the issue I mentioned before about the notion that once a search warrant has been authorized, that there should be no exclusionary rule, where there has been proper police conduct in obtaining that search warrant. There will be cases before the Supreme Court on that issue. They have not ruled directly on that at this point. It would not be beyond the prediction, given the cases that exist here, that they may very well decide that a search conducted pursuant to a warrant does not trigger the exclusionary rule. That does not happen to be the state of the law at the moment.

The question is whether or not the legislature could make that statement at this point in time, before any such action. I believe they could.

Mr. CONYERS. Couldn't the Court change its mind if it wanted to?

Mr. JENSEN. Sure. I think if you look at the *Ross* case, it shows where they changed their mind.

Mr. CONYERS. Finally, in general, would you trust the judgment of 535 people or 9 people?

Mr. JENSEN. I have to know who they are.

Mr. CONYERS. That would be the first question: who are the 535 and the 9?

Mr. JENSEN. I must say that I have the utmost respect for the judgment of both the Supreme Court and the Congress of the United States.

Mr. CONYERS. 535 people, most of whom are up for election this year. Do you know what desperate condition that brings about in the most rational men and women?

Mr. JENSEN. I stood for election myself and it does have an impact but I think one can retain one's rational approach to these issues during that period of time.

Mr. CONYERS. Judge Crockett.

Mr. CROCKETT. Thank you, Mr. Chairman.

You know, Mr. Jensen, there was a time not too long ago when I was confronted with this problem every day as a judge of one of America's largest criminal courts. Since I have been down here in Washington I have not been keeping up with the advance sheets. I find your presentation quite interesting. I think we begin with the proposition that the law just didn't trust sheriffs and policemen. Wherever it was possible to interpose an independent judgment, the common law leaned in that direction. I think also that because we have in the Constitution the words search and seizure, sort of looped together, they seem to think that the rules have got to be the same with respect to search and with respect to seizure.

But what I am leading up to is the general idea that whenever there is an opportunity for the officers to merely seize the container or to seize the automobile, that should not be assumed as taking with it necessarily the right to open and search. That is one of the difficulties that I find. There may be probable cause to believe that this automobile is transporting marihuana but marihuana is not in plain view. It is evidently in the trunk or in the glove compartment.

Under those circumstances, the probable cause to seize might be one thing, but it wouldn't be strong enough to search because you

have an opportunity for an independent judicial judgment to intervene.

Now I am wondering if *Ross* has changed that in any respect?

Mr. JENSEN. As I say, I believe that it has. Once again, I am not going to hold myself out to an instantaneous analysis. But I would suggest that the *Ross* decision proves that you could go into the trunk, you can open a container, if there is the probable cause you speak of. There would not be a need for a search warrant under those circumstances. That is where you now change from the *Robbins* decision of last year to the *Ross* decision of yesterday.

With probable cause, officers would be able to go ahead without the search warrants. That, I believe, is the decision——

Mr. CROCKETT. If there probable cause to seize and detain the motor vehicle, does *Ross* say that under those circumstances you also have probable cause to search the compartments of the vehicle without going to the court and getting a warrant?

Mr. JENSEN. *Ross* says if you have probable cause to stop the vehicle and you have the same kind of probable cause that would permit you to seek a search warrant and a magistrate to issue a search warrant for any particular container in that vehicle, that is sufficient for the officer to go ahead and search although he doesn't have a search warrant. There has to be probable cause to sustain any specific search of any specific container.

Once that probable cause exists, you need not get a search warrant. I think perhaps you could call upon some of your later witnesses—Professor Greenhalgh may be listening to my testimony and add his professorial observation of this. But I think what we are saying about the *Ross* case is that it specifically holds that once the probable cause is in existence, that permits a search of the interior of the car and containers within the car.

Mr. CROCKETT. In the *Williams* case in the fifth circuit, you say there was a hearing before the 24 judges, how did they divide numerically?

Mr. JENSEN. I think 13 to 11, I think that is what the dividing was. But that is the critical kind of numbers count. If you look at *Robbins,* it was a 6-to-3 decision last year and *Ross* is a 6-to-3 decision this year.

Mr. CROCKETT. The majority in *Williams* said that the exclusionary rule did not have—really wasn't a constitutional holding. It was simply a judge-made rule of interpretation.

Mr. JENSEN. That is what the *Williams* case said. I read that quote from *Williams.* That is one of these issues in which you consider the significance of that perception. Clearly, *Weeks* was a judicial promulgation of a rule in the Federal courts. Subsequently, we moved it to perhaps a different level in terms of its constitutional status. But the significance of the fact that this was judicially promulgated is still part of the debate.

Mr. CROCKETT. What does *Williams* do to *Marbury* v. *Madison*?

Mr. JENSEN. I am going to have to put that one on hold and do something about that.

Mr. CROCKETT. You conclude from *Williams* that Congress can change the exclusionary rule or even worse that the individual States can change it.

Mr. JENSEN. I think we have already alluded to this. If the Congress were to pass legislation that enacts *U.S.* v. *Williams*, I think the significance is that *Marbury* v. *Madison* would say the ultimate arbiter of this would be the Superme Court.

Mr. CROCKETT. But the Supreme Court is a political body like everything else. We didn't have these problems under the Warren Court, did we? The rule was fairly stationary. We lawyers and judges could be reasonably certain that next week would be followed just like it had been followed down through the years. But then you get a Republican administration and you reflect the thinking, I am sure, of that Republican administration, that has an opportunity to make perhaps more appointments to the Supreme Court than had been made before, and under the leadership of Mr. Justice Rehnquist we begin to reexamine the entire field of civil rights and civil liberties and narrow it to what it was under the Warren Court.

Mr. JENSEN. I don't know that I would totally agree. Chief Justice Warren happened to be the district attorney who preceded me along the track in Alameda County, so it is with a great deal of interest that I follow that entire career. I am not sure that I would agree that there was complete certainty as to where we were in terms of all of the decisions. I think that is probably part of the whole business of the action of the court in deciding.

Obviously, we are deciding something differently today in *Ross* than we did in *Robbins* last year. We are deciding perhaps something differently than we did 5 years ago in the *Chadwick* case. But I really don't know that I could put it into that total political track you suggest.

Mr. CROCKETT. Back in the sixties, my State, Michigan, wrote a new constitution. And when they got to the question of the exclusionary rule, what it provided was that notwithstanding any other convention of law, if what was seized was a gun or narcotics, it had to be received in evidence. That was part of the Michigan constitution. The Michigan Court of Appeals upheld it and in a sort of wishy-washy way the Supreme Court, in fact, said it was valid.

Then about 2 years later, I became a judge in the court and one of my first rulings was that it was invalid, that the individual State could not legislate in opposition to the entire Nation. Over the years, over a period of about 2 years, the other judges began to rule the same way. And finally, it went to the sixth circuit and the sixth circuit ruled—I can't give the exact citation—that that provision of the Michigan constitution was in conflict with the Federal Constitution.

Subsequent to the sixth circuit's ruling, our Michigan Court of Appeals and then belatedly our Michigan Supreme Court said, "Oh yes, we have always believed that it was in conflict."

I mention that because you seem to put quite a bit of reliance upon the fact that a couple of States, I don't know whether you named them, but you also speak about Kentucky and New York's highest appellate courts having said, in effect, that the States have the authority to change the exclusionary rule. And I state it is the policy of this administration to get as many States as possible to legislate in this area, is that right?

Mr. JENSEN. That is right. I recall the incident in Michigan because there was a similar proposal in California at the time that was never pushed along the line because of the perception that *Mapp* v. *Ohio* would result in exactly what your decision was.

But that is different from *U.S.* v. *Williams.* As I pointed out, *Williams* is not an attempt to abolish the exclusionary rule. *U.S.* v. *Williams* is a statement of the true scope and sweep of the exclusionary rule.

Mr. CROCKETT. But the citizen's right is violated, regardless of the good faith of the officer.

Mr. JENSEN. That subsumes the point. If there was no police misconduct—that is the point I am making in terms of the search warrants or the cases where there are no rules—if there is no police misconduct, then the exclusionary rule ought not to be triggered. I think that is what *U.S.* v. *Williams* says and what the other cases say. The point we are making is that that is a true statement of the rule. To say the rule somehow or another should be extended into situations where it does not further the purpose of the rule, that is a misapplication of the rule. Not that the rule should be abolished——

Mr. CROCKETT. Isn't there another basis for the rule other than simply saying it is intended to deter illegal conduct on the part of the police officers? Don't we also believe that those who seek justice must also do justice? When the State comes before the judge, through the medium of a police officer asking for justice, it should come with clean hands. If it has in fact violated the constitutional rights of the citizen, it is no longer coming in with clean hands.

Mr. JENSEN. I agree with that. That does not meet the issue in *U.S.* v. *Williams.* As I am pointing out, where the police have conducted themselves perfectly lawfully, in the way we expect them to behave, we expect them to bring their information to the magistrate. When they bring that information to the magistrate and the magistrate says that, "I accept your information," and issues an order for them to follow, why would we then go back and say that we are going to exclude the evidence on the theory that somehow or another the police have done something that is wrong.

I think that is a misapplication of the rule. That is the point we are making. The rule maintains its justification so that where there is a violation of the rules by the police, we ought to exclude. But where there is no violation, we ought not to, because there is no justification.

Mr. CROCKETT. Thank you, Mr. Chairman.

Mr. CONYERS. Counsel Ward.

Mr. WARD. Mr. Jensen, along the same lines as the question of the effect on States, assuming Congress were to pass a proposal with the congressional claim that the meaning of that rule is not constitutionally dictated, and the court were to accept the congressional statement that the rule is not constitutionally dictated in its present form, what would prevent a State from thereafter going much further than the Federal Government?

Mr. JENSEN. There is not anything. That is the present situation now. My personal experience, say in California, is that California has a different exclusionary rule than exists federally. There are any number of situations in California where the exclusionary rule

under the California constitution and the interpretation imposed upon it by the California Supreme Court goes beyond the interpretation that is, in effect, a threshold exclusionary rule imposed by the U.S. Supreme Court.

An example would be in the U.S. Supreme Court, where one must have standing to assert the rule. Only those persons who have had their rights specifically violated may assert the rule in criminal cases—that is not the case in California. You may vicariously raise the rule because of the interpretations in California of their particular constitution.

So if this legislation were to pass, it would impose what is basically a Federal threshold.

Mr. WARD. I was thinking more in terms of the other direction. Assuming the rule has no constitutional dimensions, why would a legislative or Federal congressional enactment provide——

Mr. JENSEN. I am saying it does have. The proposal in *U.S.* v. *Williams* and the legislative enactments of that maintains a constitutional threshold as interpreted by *U.S.* v. *Williams.* What I am saying is that *Williams* and the legislative proposal that is suggested here is suggested as a constitutional statement of the exclusionary rule, not as one that changes its constitutional dimension at all.

Mr. WARD. If the court were to accept a congressional statement of what the rule is, or what the rule should be, isn't the court admitting that the rule does not have a constitutional dimension?

Mr. JENSEN. Only in terms of the threshold. The court can say, as Judge Crockett just pointed out, if the legislature attempted to remove the exclusionary rule as a sanction for the fourth amendment, totally, and in, say, a weapons case, that would not be permitted because that would be an unconstitutional expression of legislative enactment. But that legislative enactments which are constitutional, as expressed by *U.S.* v. *Williams,* would be permissible.

Mr. WARD. Switching to a different subject, one of the questions raised by the concurrence in *U.S.* v. *Williams* was the actual scope of the reasonable good faith doctrine, in particular whether it was intended to shield only errors of fact or to shield errors of both fact and law. Which way would you interpret this?

Mr. JENSEN. I think it has to be both. As I pointed out, you need both a subjective and objective analysis of a good faith assertion. The good faith belief of an officer has to be sustained as a subjective belief that is in fact good faith. Then one has to look at it in terms of a legal analysis determining whether or not that is an objectively valid position to hold. An officer could not take the position, "I don't know anything about the exclusionary rule." Take, for example, a belief I may conduct myself in a specific fashion that is clearly unlawful in terms of known rules and then holds one's self to a good faith belief. You can't do that. That is why I pointed out that a good faith, reasonable rule is precisely that.

It requires both the analysis in terms of subjective and objective law in fact.

Mr. WARD. In other words, in your mind, if an officer were making no mistakes with regard to the facts, but, shall we say, the case law was one way in his circuit and perhaps different in another circuit, and he made a mistake which was considered reason-

able but was still a mistake as to what law applied, still that mistake would be——

Mr. JENSEN. Not his subjective belief as to that. His belief would have to be a condition for the statement of the rule. But, his belief would have to be tested by the court's decision as to whether or not that is an objectively valid belief.

The question as to whether or not there is a state of law that does not provide a rule is up to the court. If there is a clearly stated rule that the officer violated, the evidence would be suppressed. If there is no stated law that states such a rule, then it must be reasonable from a subjective and objective standpoint for the officer to go ahead.

The point being that the officer can't be deterred for violating a rule that doesn't exist.

Mr. WARD. I guess I am still slightly confused. Maybe if I put it in a more specific factual situation: Assuming we are talking about the *Robbins* decision or even, hypothetically, say that court reversed itself again, and went back to the position of the *Robbins* decision and 2 days after it went back to that decision an officer searched a car, with factual probable cause to look inside the packages, believing that he was justified under *Ross,* where in fact *Robbins* had been decided 2 days ago and he was unaware of it. He has a subjective good-faith, probably reasonable, belief that the law backs him up. His facts are correct, but in actuality the law does not permit the search. Would that be legal or illegal?

Mr. JENSEN. It would be illegal if it occurred after a specific statement of a rule. The problem of *Robbins* is that the search took place in 1975 before *Chadwick,* before any of those decisions. That is the point I am getting to. In those situations there was no clear statement of the rule. At the present time there is a clear statement of the rule which would be required to be followed by an officer, regardless of any kind of subjective belief. An officer is required to know that.

As I said in the *Peltier* case, it is not only what he knows—it is what he may be reasonably held to know. He is required to know what the clear decisions are.

Mr. WARD. Assuming that there is a clear decision in the officer's circuit in one direction and a clear decision in another circuit in another direction, is he held to——

Mr. JENSEN. It is held that your circuit is the circuit you accept. If you are in a situation where your appellate track leads up to a circuit, you accept that rule. If there happens to be another circuit that has another rule, it is accepted by a circuit that is in an inferior status. An officer would be in the same position.

Mr. WARD. I don't want to mischaracterize this, but what I am hearing from you is that, with regard to factual situations, we permit good faith reasonable mistakes in facts. With regard to legal errors, we don't permit them, but we don't apply any decisions retroactively?

Mr. JENSEN. That is right. Applying decisions retroactively flies in the face of the purpose of the rule. To say we are going to make this retroactive and pretend the officer had to obey a rule that didn't exist doesn't make sense.

Mr. WARD. One or two other questions, Mr. Jensen. Obviously the members of this subcommittee, in making their decisions, have to weigh both the costs and benefits of the exclusionary rules. One of the costs alleged is, as you stated, that murderers, drug dealers, robbers, go free. I think one of the serious questions for the subcommittee is how serious a problem that is? I don't think the subcommittee has received any of that data. I don't know to what degree it exists. Would it be possible for you to collect from the various U.S. attorneys' offices information—anecdotal or statistical or whatever—about serious cases, not just misdemeanors, minor assaults, but armed robberies, serious drug dealings, and murders where a case was actually lost because of the suppression of evidence.

Mr. JENSEN. We can collect that as GAO did in the sense of specific cases that get to that point. But you are cutting across a criminal justice system at one point. I think Judge Crockett made the point I was trying to make, that he dealt with this issue everyday. He didn't deal with it 1.3 percent of his time, he dealt with it everyday.

Looking at it in a crosscut that simply says we have a specific decision to look at, somehow misses the significance of the issue. If we want to go back, we would have to not only look at those cases that reach a point where evidence is suppressed and therefore there is an acquittal, but we have to see what searches don't occur because they were not able to be conducted in such a fashion, that comported with the rules that existed outside of the courtroom.

What happens is that most of the decisions on searches are made outside of the courtroom. We would have to go back and measure any number of situations we don't have data on. But that can be done in anecdotal cases.

Mr. WARD. I would imagine that most attorneys would remember cases they had declined——

Mr. JENSEN. There are some level of statistics on declinations which would be available. We could get into not only the court decisions but on declination decisions. That would be a more substantial cut of the system but would still not reach the system.

Mr. WARD. If you could provide that for the members.

Mr. JENSEN. Certainly.

Mr. WARD. I noticed that the National Institute of Justice is currently funding a study on the impact of the exclusionary rule. The fact that this study was being made seems somewhat inconsistent with the Department advocating modification at this particular time. I realize you don't have control over both branches but is there some explanation?

Mr. JENSEN. I am not sure if that title gets to all of the issues we are talking about now. It seems to me in the sense of carrying out research on issues as important as this, I think it is important that there be some research, but I don't think that research is contradictory to the notion that if you look at the specific cases and the rules we now have, we don't need research in order to be able to look and see what the impact of *U.S.* v. *Williams* is. That isn't a matter for them to look at, it is a matter for us to look at.

Mr. CONYERS. Mr. Smietanka.

Mr. SMIETANKA. You characterized this as a non-issue in your recent dialog with Mr. Ward. You noted that there are several levels to the problem and not all of them are visible in the courtroom. But I am curious, judging from the Department's experience with the implementation of the exclusionary rule, would you have any kind of a ball park estimate as to what percentage of cases in which an exclusionary issue arises would be resolved in favor of the admissibility of evidence by the statutory creation of the reasonably good faith rule?

Mr. JENSEN. I cannot give you a statistical kind of assessment. I think what you are asking is that if the legislature were to enact a *U.S.* v. *Williams* good faith testimony, which specific cases would be affected. There just is not specific enough data for me to say anything about that. That would have to be intuitive. A lot of the ways in which we work is somewhat intuitive.

What I am saying is that it would have a significant impact. That is about as good as I can say it.

Mr. SMIETANKA. Thank you.

Mr. CONYERS. Mr. Jensen, you have been generous with your time. We appreciate it very much.

Mr. JENSEN. I appreciate this opportunity very much.

[The prepared statement of Assistant Attorney General Jensen follows:]

PREPARED STATEMENT OF D. LOWELL JENSEN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

I am pleased to be here today to present the views of the Department of Justice on the Fourth Amendment "exclusionary rule," a topic of critical import for the enforcement of criminal law in this country. I would like to discuss with you several issues in this regard:

1) What the exclusionary rule is and how it has developed;

2) Specific cases which illustrate contemporary implementation of the rule; and

3) Proposed legislative changes in the rule that we believe will restore common sense to the federal criminal justice process and eliminate unjust results in the implementation of the rule.

It is important at the outset to recall the specific words of the Fourth Amendment upon which the rule is based: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

It is apparent that the "exclusionary rule" itself is not articulated in the Fourth Amendment or, for that matter, in any other part of the Constitution, the Bill of Rights, or the federal criminal Code. The exclusionary rule is, rather, a judicially declared rule of law created in 1914, when the United States Supreme Court held in Weeks v. United States, 232 U.S. 383, that evidence obtained in violation of

the Fourth Amendment is inadmissable in federal criminal prosecutions.

This doctrine was criticized by many commentators from the start, but the rule became firmly implanted in the federal criminal justice system. The states, however, were divided in their opinion of the rule. In the three decades following Weeks, sixteen states adopted the rule while thirty-one states refused to accept it.

It was not until 1949 that the Supreme Court was squarely confronted with the question of whether the exclusionary rule should be applied to state criminal prosecutions. In Wolf v. Colorado, 338 U.S. 25 (1949), the Court held that although the guarantees of the Fourth Amendment applied to the states through the due process clause of the Fourteenth Amendment, the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. Later, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court reversed its decision in Wolf and held that because the Fourth Amendment right of privacy was enforceable against the states through the Fourteenth Amendment, "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

Before I discuss the purpose of the exclusionary rule and the problems posed by its present application, I think it is important to address some of the misplaced arguments

raised in the current debate over the rule. It is my opinion that the issues discussed in these arguments are, upon proper analysis, non-issues.

One of these non-issues relates to the impact of the rule on the crime rate. Supporters of the rule claim that advocates for modification of the present rule argue incorrectly that reforming the rule will reduce the crime rate. The fact, however, is that advocates for reform do not claim that any such change is a panacea for crime rate reduction. Any thoughtful consideration of contemporary crime must recognize, unfortunately, that there are no panaceas. On the other hand, advocates for reform do point out that the rule operates to free known murderers, robbers, drug traffickers and other violent and non-violent offenders and that a rule of evidence which has such a result without a reasonable purpose to support it is intolerable.

Another non-issue relates to the impact of the rule on criminal cases. Supporters of the rule cite a 1979 General Accounting Office report which found that evidence was actually suppressed in only 1.3% of a sample of federal criminal cases and argue that modification or abolition of the exclusionary rule is, therefore, not a significant criminal justice issue. Aside from the inevitable analytic flaws in the GAO report -- for example, it did not consider cases not ever presented to United States Attorneys because

the law enforcement agency involved felt they presented Fourth Amendment problems -- any common sense perspective on the criminal justice world must take note that the exclusionary rule is a necessary consideration of every police arrest and of every seizure of physical evidence, that the rule is the overwhelming component of drug case litigation, and that the appellate court overload which faces every judicial system in this country is due in no small measure to appeals of exclusionary rule issues. The argument that, somehow, the exclusionary rule has an insignificant impact on the criminal justice process is totally disingenuous.

Judicial Rationale of the Exclusionary Rule

Discussion of the true issues pertaining to the exclusionary rule must begin with an examination of the purpose behind the rule. When the exclusionary rule was first articulated in Weeks, supra, the Court justified its holding on two grounds: deterrence of unlawful police conduct and maintenance of judicial integrity. In Elkins v. United States, 364 U.S. 206 (1960), the court stated the deterrence ground as follows:

> Its purpose is to deter -- to compel respect for the Constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.

The judicial integrity rationale was based on the notion that courts should be prevented from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Early exclusionary rule cases mentioned both

rationales. However, over time, as the rule has been explicated, the asserted rationale of judicial integrity essentially has been abandoned.

The emergence of deterrence as the reason for the rule is aptly illustrated by the Court's opinions in Fourth Amendment retroactivity cases. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court, considering the issue for the first time, refused to apply Mapp v. Ohio retroactively. The Linkletter Court observed that the basis for Mapp's application of the exclusionary rule to the states was its finding that the rule "was the only effective deterrent to lawless police action." Applying that premise to the Linkletter case, the Court noted that it "cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved." Id. at 637. Likewise, in Desist v. United States, 394 U.S. 244 (1969), the Court observed that "[t]he exclusionary rule 'has no bearing on guilt' or the fairness of the trial.'" Id. Accordingly, it "decline[d] to extend the court-made exclusionary rule to cases in which its deterrence purpose would not be served." Id.

More recently, in United States v. Peltier, 422 U.S. 531 (1975), the Court held that the policy underlying the exclusionary rule did not require the suppression of evidence seized in searches which were clearly unlawful under standards

established before the trial of Peltier in the case of Almeida-Sanchez, 413 U.S. 266 (1973), but were lawful at the time they were actually carried out, which was before Almeida-Sanchez was decided. The Court observed that although Supreme Court decisions applying the exclusionary rule to unconstitutionally seized evidence have referred to "the imperative of judicial integrity," the Court has relied principally upon the deterrent purpose served by the exclusionary rule. The Court further noted that the lesson to be learned from the retroactivity cases is that "the 'imperative of judicial integrity' is ... not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." Id. at 537-38. Focusing specifically on the deterrence purpose, the Court concluded that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 542.

In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court held that the rule should not be applied to exclude evidence when it has been seized during an arrest for violation

of a statute valid at the time of the arrest but which is subsequently declared invalid. The Court stated:

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule. Id. at 38 n.3.

The declaration in the retroactivity cases of the deterrence rationale for the exclusionary rule is also apparent in the Court's approach to determining whether the rule should be applied in a variety of other circumstances. In United States v. Calandra, 414 U.S. 338 (1974), the Court held that a witness before a grand jury could not refuse to answer questions based on evidence obtained in violation of the Fourth Amendment. In that case, the Court stated that the

> purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim.... Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.

In United States v. Janis, 428 U.S. 433 (1976), the Court refused to exclude from a federal civil proceeding evidence seized unconstitutionally but in good faith by state law enforcement officers. The Court concluded that "exclusion from federal civil proceedings of evidence unlawfully

seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." Id. at 454. Because the evidence in both Calandra and Janis had been obtained unlawfully, application of the judicial integrity rational would have required suppression of the evidence. However, as noted above, the Court considered the deterrent purpose of the exclusionary rule as its primary rationale and concluded that the evidence should not be suppressed.

The deterrence rationale was also used as the basis of exclusionary rule analysis when the Court held that unlawfully seized evidence is admissible to impeach the defendant's testimony at his criminal trial, United States v. Havens, 446 U.S. 620 (1980) and that no person other than the defendant has standing to ask for the invocation of the exclusionary rule. See Rakas v. Illinois, 439 U.S. 128 (1978). In sum, the judicial integrity rationale has essentially been abandoned by the Court as a factor in its exclusionary rule analysis.

Problems with the Rule

As the above cases demonstrate, the Court has clearly established that the true purpose behind the exclusionary rule is the deterrence of police misconduct. The heart of the problem with the exclusionary rule lies in its application: the courts have gradually expanded its application to situations

in which the rule cannot possibly serve as a deterrent. This expansion has distorted the preeminent purpose of the rule with the result that the truth finding process is impeded, and society is done a grave and unnecessary injustice.

The clearest example of misapplication of the exclusionary rule arises when courts suppress evidence seized by police in executing a duly authorized search warrant. In that type of case a second or third judge, in disagreement with the judge who issued the warrant, invalidates the search despite the absence of any police misconduct. Consider in this regard United States v. Karathanos, 531 F.2d 26 (2nd Cir. 1976). In that case, INS agents obtained a warrant to search certain business premises. The warrant was issued based on an affidavit that the magistrate found sufficient to establish probable cause that the defendant was involved in the criminal harboring of illegal aliens. The district court judge, however, disagreed with the finding of the magistrate who issued the warrant and held that probable cause had not been stated. The evidence that had been obtained by the search was suppressed, even though the appellate court acknowledged that there was no suggestion that the agents had acted improperly either by procuring the warrant in bad faith or by making a material misrepresentation in the warrant application.

United States v. Shorter, 600 F.2d 585 (6th Cir. 1979),

is another example of the exclusionary rule being applied where an authorized search warrant is invalidated by a second judge or court. In that case, local police and agents of the Federal Bureau of Investigation (FBI) arrested a suspected Ohio bank robber at his home. After the arrest, the FBI agent telephoned a federal magistrate and stated his grounds for a search warrant which was then issued by the magistrate as permitted by law. The subsequent search produced incriminating evidence, including bait bills and a firearm. The trial judge ruled the search lawful, but the conviction was reversed on appeal. The appellate court decided that although the officer had in fact been placed under an oath by the magistrate which incorporated all the testimony already provided in the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the beginning of the telephone conversation violated the law because the applicable Federal Rule requires that the oath be obtained "immediately."

These cases involve disagreements between judges about judicial conduct -- there is no police misconduct involved. The police were carrying out their duties as society expects them to do: the officers provided their information fully and honestly to the court and proceeded to carry out the orders of the court once the warrants were issued. Suppression of evidence in instances such as these does not serve the

purpose of the exclusionary rule, the deterrence of police misconduct. In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules only to have the evidence suppressed on the premise that they have violated the Constitution. Proper police conduct is thereupon falsely labeled as illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear, where the law is thoroughly confused or even in situations where the cases are in flat contradiction. Police often are confronted with the question of whether to conduct a warrantless search in the field when the circumstances they are facing are not covered by existing case law.

Last term, the United States Supreme Court decided two cases that aptly illustrate this point, New York v. Belton, __U.S.__, 101 S. Ct. 2860 (1981), and Robbins v. California, __U.S.__, 101 S. Ct. 2842 (1981). The cases are remarkably similar factually. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in Robbins, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant,

and found 30 pounds of marijuana. In Belton, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required an analysis of the "automobile exception" cases which pertain to the validity of warrantless searches of cars and their contents (see, e.g., Carroll v. United States, 267 U.S. 132 (1925)); the doctrine of "search incident to arrest" as defined by Chimel v. California, 395 U.S. 752 (1969); and the watershed case of United States v. Chadwick, 433 U.S. 1 (1977), in which the Court held that police must obtain a warrant to open a closed container in an automobile where the possessor of the container has exhibited a "reasonable expectation of privacy" in that particular container.

When the Supreme Court decided Belton and Robbins, three justices opined that both searches were legal; three justices opined that they were both illegal; and three justices controlled the ultimate decision that Robbins was illegal and Belton legal. To add to the confusion, the Robbins search now said to be illegal had been found to be legal by the California courts and the Belton search now said to be legal had been found to be illegal by the New York courts. When Robbins was finally decided, 14 judges had reviewed the search: seven found it valid; seven, invalid. Now that Robbins and Belton have been decided, do we know the law

which governs police conduct in similar searches? Justice Brennan offers this comment in his Belton dissent:

> The Court does not give the police any 'bright line' answers to these questions. More important, because the Court's new rule abandons the justifications underlying Chimel, it offers no guidance to the police officer seeking to work out these answers for himself.

To the same end, Justice Rehnquist dissented in Robbins by citing the language from Justice Harlan in his concurring opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971):

> State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an every day question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime.

Furthermore, it is not surprising that the whole field of law involved in these cases is again before the United States Supreme Court in United States v. Ross, argued in March of 1982, in which the Court asked both sides to address the question of whether Robbins should be reconsidered.

As we reflect upon the rule of law resident somewhere within these decisions, let us also consider an important fact which is often overlooked in exclusionary rule discussions. The search in Robbins actually took place on January 5, 1975, long before Chadwick was decided on June 21, 1977. At the very least, it is fair to say that the applicable rule at the time of the search was even more elusive at that time

than it is today, and yet we have imposed the final definitive sanction of suppression of reliable, trustworthy evidence in such a situation on the assumption that this judicial act will deter police misconduct.

With respect to this typical exclusionary rule analysis, it is instructive to note that the standard to which police are held in Fourth Amendment cases is stricter than that to which attorneys must comply when they are judged under the Sixth Amendment guarantee that criminal defendants be represented by competent counsel. Consider in this regard, People v. Russell, 101 Cal. App. 3d 665 (1980), an automobile stop/closed container case decided by a California appellate court in 1980.

In Russell, once again there was a lawful stop, lawful opening of the car trunk, and police discovery of marijuana when they unzipped a flight bag. At trial the search was uncontested, and the defendant convicted. On appeal it was contended that his counsel at trial was incompetent under the Sixth Amendment when judged against the California standard announced in People v. Pope, 23 Cal. 3d 412 (1979), which requires that an appellant "show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." In support of this position, the defendant argued that counsel had not asserted that opening the flight bag required a search warrant under

the requirements of People v. Dalton, 24 Cal. 3d 850 (1979), a California search and seizure case in which the court had applied the holding in Chadwick, supra, despite the fact that the search took place prior to the Chadwick decision.

The Court rejected the defendant's contention that the attorney was incompetent, stating:

> It was first noted that the hearing on Russell's motion to suppress evidence occurred February 13, 1979. The opinion of People v. Dalton was filed six months later, August 16, 1979. It is doubtful that Pope requires, under pain of being held to have furnished constitutionally inadequate representation, such prescience on the part of a lawyer for one criminally accused.

Implicit in that language is a conclusion that the state of the law of search and seizure was such that a criminal defense attorney, when confronted with the issue in the courtroom, was not expected to be aware that there was a Fourth Amendment violation on those particular facts. Indeed, the court found that a reasonably prepared attorney was not expected to anticipate that a future search and seizure decision, People v. Dalton, supra, would hold similar police conduct unlawful. Yet as was illustrated in the Dalton and Robbins decisions, there is no such hesitation in requiring "such prescience" on the part of police officers faced with precisely the same problem of legal analysis which confronted the attorney in Russell.

The consequence of applying the exclusionary rule in the cases discussed above is two-fold. First, the purpose

of the exclusionary rule is not served when the officers believe, in good faith, that they are performing a lawful search. When law enforcement officers obtain a warrant in good faith or when they make a reasonable, good faith attempt to predict the decisions that future courts will make, there exists no logical basis for excluding the evidence they have gathered. Applying the rule in these cases fails to further in any degree the rule's deterrent purpose, since conduct reasonably engaged in, in good faith, is by definition not susceptible to being deterred by the imposition of after-the-fact evidentiary sanctions.

Second, application of the exclusionary rule when the police have acted reasonably and in good faith results in attaching a false label to proper police conduct. This adversely affects the criminal justice system by fostering the public perception that police are engaged in lawless, improper conduct when that is simply not the case. The Supreme Court recognized these effects in Stone v. Powell, 428 U.S. 465 (1976), in which it stated:

> The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice.

The unjustified acquittals of guilty defendants due to application of the exclusionary rule has resulted in a growing concern by our citizens that our system of justice is lacking in sense and fairness. Unfortunately, it seems unlikely that any of these conceptions by the public will change as long as the exclusionary rule remains in its present form and courts continue to expand its application to situations where law enforcement conduct has been manifestly reasonable.

Proposed Legislative Modification

The specific action we suggest in the area of legislative limitation of the rule, as contrasted to legislative abolition of the rule, is based upon a recent significant opinion on the rule rendered by the Fifth Circuit. In United States v. Williams, 622 F.2d 830 (5th Cir. 1980), the Fifth Circuit, after an exhaustive analysis of the relevant Supreme Court decisions, announced a construction of the exclusionary rule that would allow admission at trial of evidence seized during a search undertaken in a reasonable and good faith belief on the part of a federal officer that his conduct was lawful. A majority of the 24 judges of that court, sitting en banc, concurred in an opinion that concluded as follows (Id. at 846-847):

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of

> the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds it shall not apply the exclusionary rule to the evidence.

In justification of this conclusion, the court first noted that the exclusionary rule is not a constitutional requirement. Rather, the court described it as "a judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence of future police misconduct." The court determined that the deterrent purpose was the preeminent purpose behind the rule and further noted that this purpose was not served when the improper police actions were taken in reasonable, good faith. Accordingly, there was no compelling reason to apply the exclusionary rule in such cases.

The reasonable good faith rule announced by the Fifth Circuit is the same rule urged last year by the Attorney General's Task Force on Violent Crime. If implemented, we believe that this restatement of the exclusionary rule would go a long way towards insuring that the rule would be applied only in those situations in which police misconduct logically can be deterred. Law enforcement officers will no longer be penalized for their reasonable, good faith efforts to execute the law. On the other hand, courts would continue to exclude evidence obtained as a result of searches or seizures which were performed in an unreasonable manner or

in bad faith, such as by deliberately misrepresenting the facts used to obtain a warrant. Thus, the penalty of exclusion will only be imposed when officers engage in the type of conduct the exclusionary rule was designed to deter -- clear, unreasonable violations of our very important Fourth Amendment rights.

It should be noted that the reasonable, good faith rule requires more than an assessment of an officer's subjective state of mind and will not, as is sometimes argued, place a premium on police ignorance. In fact, the rule requires a showing that the officer's bona fide good faith belief is grounded in an objective reasonableness. As the Williams court explained, the officer's belief in the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe he was acting lawfully." Accordingly, an arrest or search that clearly violated the Fourth Amendment under prior court decisions would not be excepted from the rule simply because a police officer was unaware of the pertinent case law. Thus, there would remain a strong incentive for law enforcement officers to keep abreast of the latest developments in the law.

Constitutionality of Congressional Modification

The Department of Justice has suggested specific legislation to implement the reasonable, good faith exception to the rule.

Our proposal was introduced in the Senate as S. 2231, which is based on the language in United States v. Williams enunciating the reasonable good faith exception. We recommend that identical or similar language be adopted by this Subcommittee in any legislation that seeks to modify the exclusionary rule. We believe that Congressional legislation which embodies the Williams case's reasonable, good faith exception to the exclusionary rule would be held to be constitutional.

Indeed, Congressional action in this area was explicitly invited by Chief Justice Burger in his dissenting opinion in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), in which he stated that "the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced." Id. at 424. As a possible alternative to the rule, the Chief Justice suggested that Congress develop a new statutory remedy for victims of unconstitutional searches and seizures. However, the tort remedy was not offered as the exclusive acceptable substitute. Supreme Court decisions during the past decade support the conclusion that the Court today would sustain reasonable congressional action limiting the rule without the substitution of a new remedy, so long as the modified rule furthered the purpose of the exclusionary rule as articulated by the Court.

As I have already demonstrated, there is legal precedent for adoption of a reasonable, good faith exception. The exception is primarily grounded on Supreme Court cases such as United States v. Peltier, supra and Michigan v. DeFillippo, supra, in which the Court emphasized deterrence as the exclusionary rule's primary basis and refused to apply the rule when the conduct of the law enforcement officer was not capable of being deterred. The good faith exception is also consistent with any notions of "judicial integrity" to the extent that such a concept remains as a rationale for retaining the rule in some form. As the Supreme Court stated in Peltier, supra, "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law...."

Finally, it is important to remember that the reasonable, good faith exception already has undergone constitutional scrutiny and been upheld in both federal and state jurisdictions. The Fifth Circuit found the exception to be constitutional in United States v. Williams, which has already been discussed. In addition, the Williams holding has been followed by the highest appellate courts in New York and Kentucky. See People v. Adams, 442 N.E. 2d 537 (N.Y. Ct. App. 1981) and Richmond v. Commonwealth, 29 Cr. L. 2529 (Ky. Ct. App. 1981). It has also been codified by at least two state

legislatures. See Colo. Rev. Stat. § 16-3-308 (1981); Ariz. Ch. 161 (1982). Thus, the exception already has established a solid basis of constitutional and legislative support.

Conclusion

I would like to emphasize that legislation adopting a reasonable, good faith exception to the exclusionary rule should be viewed as a measure that simply states the true scope of the rule. Given that deterrence is the rationale for the rule, the situations where law enforcement officers have performed a search or seizure reasonably and in the good faith belief that their conduct comports with the law are precisely the ones in which it seems indefensible to exclude the evidence they have gathered. When a court does order suppression of evidence in such circumstances, it imposes a label of police misconduct when in fact there is none. The result is that law enforcement officers must suffer the personal indignity of being branded as lawbreakers, while at the same time the public is misled into thinking that there is widespread police abuse when it does not actually exist. Moreover, indiscriminate application of the exclusionary rule allows the determination of guilt or innocence to be made without assessment of all the probative and trustworthy evidence available, thereby rendering the criminal justice system unreliable and impotent.

Implementation of the reasonable, good faith exception

would limit application of the exclusionary rule to furtherance of its original purpose of deterrence. As a result, the focus of criminal proceedings would remain directed to the process of determining the truth in order to convict the guilty and acquit the innocent. Faith in the criminal justice system would be strengthened because the police and public would no longer be penalized by the unnecessary suppression of reliable evidence. This common sense limitation of the exclusionary rule would return integrity to our judicial system and law enforcement programs. We strongly urge that legislation to this effect be adopted by this Subcommittee.

Mr. Chairman, that concludes my prepared testimony and I would be pleased to answer any questions the Subcommittee might have.

Mr. CONYERS. Our next witness is representing the National Association of Attorneys General. He is the attorney general of Rhode Island. We are very delighted to have him come before us. We know he has had extensive experience with this subcommittee.

Haven't you testified on the criminal code?

TESTIMONY OF DENNIS ROBERTS II, ATTORNEY GENERAL, STATE OF RHODE ISLAND, ON BEHALF OF NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. ROBERTS. I have, Mr. Chairman, yes, as well as on some Federal funding proposals, Congressman. I have had the privilege to appear before you, Mr. Chairman, on the criminal code a month or two ago—I guess it is more like 6 months ago.

Mr. CONYERS. We are happy to see you back again. We have been spending some time on the constitutional aspects of any suggested change. I have received a number of suggestions that the exclusionary rule is constitutionally derived, constitutionally mandated and that it is not constitutionally mandated, that it is merely a rule of the Court.

Where does your organization come out on this question?

Mr. ROBERTS. The majority of my organization, the majority of the Association of Attorneys General is on the side that it is not constitutionally derived. It is a matter of rulemaking authority of the Supreme Court. I regret that I did not have the opportunity unfortunately to prepare prefiled testimony.

I must begin my remarks, Mr. Chairman, Judge Crockett, with a series of disclaimers. While I am involved in much of the criminal justice side of the work of the National Association of Attorneys General, I did not sit on the committee that worked on the exclu-

sionary rule. However, I do represent a State in which the central prosecutorial authority for felonies is in the State attorney general. So my jurisdiction would be typical district attorney's jurisdiction as well as State attorney general jurisdiction.

Later this week, I believe the subcommittee is scheduled to hear a presentation by my colleague, Attorney General Sachs of Maryland, who represents a minority view, within the National Association of Attorneys General, which is shared by a number of others, I think three or four others, including Attorney General Belotti of Massachusetts. There is no unanimity in our group, although there is a strong majority position that the exclusionary rule is not of constitutional derivation. We support a *Williams* rule-of-reason test.

We do not support any particular one of the several bills which are presently pending either in this body or in the Senate. We have not held out our position as being a modification which would solve all crime problems in the United States or would have the effect, I believe in one of the questions that was posed before of eradicating criminal justice. But what it would do, in our judgment, is to restore balance in that class of cases, and only in that class of cases, where an improper application of the exclusionary rule becomes a serious problem for the implementation and administration of criminal justice.

How often can that happen? Counsel asked a question a few minutes ago of Mr. Jensen—did he have any statistical analysis of how often the exclusionary rule might in fact lead to somebody certainly walking away from a case where there was substantial evidence?

I don't know that anybody could answer statistically. I think certainly from the point of view of State and local law enforcements, one can share a feeling, if you will, with the subcommittee. I think it is safe to say at least at the State and local level you may reasonably expect that a motion to suppress based on fourth amendment grounds, based on the exclusionary rule, will be filed in basically every case where material evidence involved evidence that was obtained as a result of search and seizure.

I think it is safe to say because it is in State and local practice at least a reasonably standard motion to make in the vast majority of cases; there is going to be a denial of that motion. The issue arises in that minority of cases in which the motion is in fact granted and the minority of which in fact the granting of the motion results in the denial of justice between not the State as an entity, but the people of the State of Rhode Island in my case, and the defendant. That is what the National Association of Attorneys General sees as the evil effect in the nonmodified exclusionary rule. That is what we are certainly attempting to correct.

I suppose any prosecutor who comes here could tell war stories about horrible things that happened. I don't intend to tell them in the sense of blowing them out of perspective, but we in my jurisdiction, as in any other, have had instances in which the exclusionary rule was applied in a way that I think bought substantial disrepute upon the justice system.

We had two cases over the last several years that I have been the attorney general that have been worrisome to me. One involved a situation where an automobile was stopped in an industri-

al area of the city of Pawtucket, which is an old mill city, at 3 or 4 in the morning. It was stopped because the police officer saw the bumper of the car, dragging along, was so weighted down that it was causing sparks to fly off the sidewalk in this otherwise deserted area at 3 o'clock in the morning.

The police officer saw it and saw three men in the car and two of them he knew were major violators with organized crime connections. They were taken to the station. The car was put in the parking lot of the station. The police obtained a warrant from a district court judge and based upon the warrant, executed a search of the vehicle in which they found substantial amounts of stolen goods, stolen from a factory in the immediate vicinity of the location where the car was observed and where in fact there had been a police alarm signal that had been turned in before.

That evidence, subsequently was held excluded on fourth amendment grounds by application of the exclusionary rule. Needless to say, the combination of the facts in the case and identity of the defendants gave rise to the considerable public outcry about the automatic application of the exclusionary rule in that case.

The second case involved what is known as the "Dorchester case." The "Dorchester case" was actually a whole series of cases involving the growing, producing, trading in and importation by ship of major amounts of marihuana. We lost literally a shipload of marihuana to the exclusionary rule in that case based upon the failure of the police to obtain a warrant under circumstances where the exclusionary rule again was held to apply.

I don't want to get into details of different cases. These kinds of cases, I believe, represent a minority. Where some tests other than automatic application of fourth amendment principles seems to me as a representative of my association and a person involved in local law enforcement, if you will, sees some need for relief. We don't point to it as a panacea but we point to it to give us aid to redress the balance between the people of our State and of our district, in the case of the U.S. attorneys and the accused.

I think in not only listening to Mr. Jensen today, but in discussing the position of the Department of Justice as Mr. Jensen has developed it before—he and I served together on a number of law enforcement committees—I think that you will find the National Association of Attorneys General and the Department of Justice to be in substantial agreement on most of the issues regarding the exclusionary rule.

I don't know whether Justice has taken any position on any specific legislation. We have not. But as far as the principles that arise, constitutional differentiation, the applicability of the good faith exception to questions of fact, as well as questions of law, most of the issues which the subcommittee has raised today, and which are the normal subject for discussion of the exclusionary rule, I think you will find Justice and the Attorneys General Association to be pretty much on course with each other.

Mr. CONYERS. Did your association issue a comment on the Attorney General's Task Force work?

Mr. ROBERTS. I know certainly a number of us individual attorneys general have not only issued a comment but relied rather heavily on the Attorney General's Task Force on Violent Crime. I

think recommendation 40 of that, which relates to the exclusionary rule, is a statement of a recommendation and a commentary, which reflects what I understood to be the substance of Mr. Jensen's remarks before, and I would intend to be the substance of mine. I think it reviews *Williams* in some detail, by way of parenthetical. Of course, this doesn't directly affect me or my colleagues in State law enforcement.

It is certainly an unusual situation to have two of the U.S. judicial circuits interpreting the exclusionary rule one way and the remaining circuits interpreting it another, with the Supreme Court declining the opportunity to review. In that context, it would seem to me there was a good deal of discussion with Mr. Jensen about the meaning of *Ross* and the sum total of my knowledge of *Ross* began on the 1 o'clock news last night and includes reading the New York Times this morning.

But it seems to me pretty clear that *Ross* is responding to problems that the Supreme Court perceives with the exclusionary rule, and that they are obviously addressing what they see as a modification of the exclusionary rule. How that eventually plays it out in the other State and Federal courts I suppose only time will tell. But I think it would have been desirable from the point of view again of one who has to administer in the executive branch the criminal justice system, had the Supreme Court agreed to review Williams' testimony. They declined. They didn't and I suspect when you get to read the *Ross* opinion, there is going to be some kind of response, the second bite at the apple or second crack of the ball, or something like that. Because it is a genuine—I think in point of view of the Federal law enforcement authorities an attorney general has to determine how a search and seizure can be unlawful in North Carolina and lawful in Georgia or vice versa.

Mr. CONYERS. Now, your relationship to Mr. Jensen goes back to his days with NAAG?

Mr. ROBERTS. Mr. Jensen was the district attorney and was active in the National District Attorney's Association, which is another group I know is related to a number of other issues. My relationship is involved with my representing the National Association of Attorneys General in various operations. One committee referred to is the Executive Working Group within the Department of Justice, which combines Federal, State and local law enforcement. And other seminars and projects which I have been privileged to be invited to participate in.

Mr. CONYERS. All I am trying to find out is if there is cooperational efforts between NAAG and the District Attorneys Association?

Mr. ROBERTS. There are, sir.

Mr. CONYERS. To what extent?

Mr. ROBERTS. I think there are a great many. I think we can reference it in two ways.

Mr. CONYERS. Most attorneys general were once district attorneys?

Mr. ROBERTS. Many were, many were. Of course, as you know, Mr. Chairman, the criminal jurisdiction of attorneys general varies pretty widely from State to State, across the country. Many, many in fact, I wouldn't want to try to estimate, but maybe one-third to

one-half of the attorneys general have district attorney background.

Mr. CONYERS. Most judges were district attorneys?

Mr. ROBERTS. Based on the prosecution point of view you can't always tell that when they make it to the bench, if that is true. The district attorney of course in most States, in my State and one or two other States the attorneys general, are kind of in a unique position to observe the less glamorous aspects of the criminal justice system in running thousands and thousands of cases from the most routine felonies, to some pretty heavy kind of cases through the system.

I think from our point of view, as I mentioned before, as we addressed the issue of exclusionary rule, we see an awful lot of motions being filed. I think that most defense counsels would everytime they have a piece of tangible evidence that came about as a result of a seizure, they will file a motion to suppress that. They may have no real evidence for the motion to be granted but you are dealing with the type of cases where you have generally the major violation. It is the major violation obviously which attracts the attention of the public and I think it is the major violation, quite frankly, where the representative rights of the citizenry as a whole and the defendant come most sharply into focus.

The two examples I used before in my statement would be developed a great deal in my State and could be developed by anybody, by the district attorney from virtually any district in the country, I think. We have a situation within the National Association of Attorneys General, where a number of our colleagues, as I say, feel that the exclusionary rule as modified should stand, but the vast majority of us feel contrary and would endorse something like the *Williams* recommendation.

I noted today the subcommittee oversight hearing is not really addressing any piece of legislation. So, I don't frankly come to speak in detail on any piece of legislation beyond that general recommendation.

Mr. CONYERS. I take it that it is your impression that *Ross* was a reaction, to some extent, to public opinion like the reaction to the cases that you cited in your two horror stories from your State. People get really aroused over some process within the criminal justice system that frustrates what seems to be a logical result. I mean what excuse could there be for letting off someone caught redhanded with stolen goods?

Do you think that in *Ross* the Supreme Court is reacting to that kind of public outcry?

Mr. ROBERTS. Not precisely. I suspect the Supreme Court in *Ross* may have been reacting more—I think what you have described is why this issue was posed where other law enforcement issues are in the front of the public mind, what your constituents and my constituents have to ask about the exclusionary rule, which is not the same thing as the right to counsel or some other constitutional principle of equal standing.

I would suspect the Supreme Court in *Ross* was reacting to the negative reaction of the bench and bar to the two automobile seizure cases during the last term, which seemed to anybody, I think any judge who attempted to apply them, to reach a point of meta-

physical distinction—the names of the cases escape my mind—distinguishing between the parcel enclosed in a suitcase or a parcel enclosed in a jacket.

I think right there, upon perhaps more mature reflection, the Supreme Court might have realized that they had set down rules in those cases which were simply incapable of application by judges across the country.

Mr. CONYERS. Why didn't the police in the marihuana case get a warrant?

Mr. ROBERTS. I think they thought the boat was going to sail away. I am not speaking now for the national association, I am speaking as the chief law enforcement officer of the State. I think it can be salutory for a police officer to lose a major case on the basis of not getting a proper warrant because police departments get more conscious. If you have a reasonable amount of time to do so, you ought to get the warrant.

I think the police in that case, in my judgment—of course, we advocate its position for years in the course of litigation—had reasonable cause to believe that had they not detained the vessel at the time, that as with the car, the vessel simply would have sailed out of the bay and been on its way.

Mr. CONYERS. Where?

Mr. ROBERTS. I don't know. Who knows?

Mr. CONYERS. Out on the high seas?

Mr. ROBERTS. Certainly in many States. Unfortunately, it is becoming a prevailing condition around the country. I was in Illinois a few weeks ago testifying out there for my colleague on a statewide grand jury. They are having an experience that we are having in the Northeast. You are starting to have Latin American nationals, Colombian nationals showing up in our jurisdictions with large quantities of narcotics. This was a phenomenon which, as you well know, Mr. Chairman, was largely confined to Florida and southern California and other border areas for most of the time it has been a problem. Now we are getting them thousands of miles away in Chicago, and Providence.

Apparently the trade is so lucrative that those who come in and leave the substances there, will simply leave huge quantities of street value drugs or even cash and take off rather than be apprehended, because the cash is totally fungible. The cash can be replenished with another supply of Colombian narcotics.

Mr. CONYERS. Now, in the case where the ship left and the police hadn't had time to get the warrant, did these policemen know that they had an obligation to get a warrant? Was this a calculated risk that they took or were they acting without benefit of being informed as to the state of the art?

Mr. ROBERTS. I think they knew—they know the basic street laws surrounding the searches and seizures and they know if there is a reasonable opportunity to secure a warrant they should do so.

Mr. CONYERS. Then why wasn't the public outcry against the police as opposed to against the system?

Mr. ROBERTS. Why wasn't it? The public outcry——

Mr. CONYERS. I think you cited the story of how people get tired of——

Mr. ROBERTS. The public outcry was against a technicality which had been used to frustrate the police in their attempt to enforce the law. Whether that is judicially or legally correct or not, I don't think is the point—that is not the point I was trying to make. If in fact there was a good faith exception, let's say—let's take a *Williams* definition of a good faith exception, and that could be applied, then you are into a situation where the police conduct would be judged by a different standard.

Our view was that if you had a good faith exception, that the police here were operating in a good faith belief that if they were to leave the scene and go—as you would expect when a drug boat pulls in, it doesn't pull into the main slip of Providence Harbor—go to wherever a judge was located, secure a warrant and go back, the boat might be gone, and the party that bought it, who may or may have not been making surveillance, I really don't know, would be gone. That was their belief. Whether they were correct or not never became a material inquiry in the case, because of the applicability of the exclusionary ruling.

Mr. CONYERS. Were the police reprimanded or was there any action taken within the police command as a result of this activity?

Mr. ROBERTS. Nothing that would appear—nothing I would know about.

Mr. CONYERS. In other words, this was not held against them in terms of their promotion or eligibility?

Mr. ROBERTS. Not to my knowledge, sir.

Mr. CONYERS. Well, let's say the police blew it in this instance. They had to release them. Wasn't there the legal remedy even after that in terms of holding up the ship full of marihuana?

Mr. ROBERTS. No; because what happened, we were prosecuting the individuals who controlled the ship on charges of possession with intent to sell marihuana. That is the appropriate charge in our State. Certainly when you lose the ship, and its contents, you lose your corpus delicti. So there was no opportunity to prosecute.

Mr. CONYERS. There was no further remedy?

Mr. ROBERTS. We have been trying cases—in fact, I think I did mention, and perhaps I should get into a little more detail, what the cases involve. It was a group of people who are certainly running the drug operation out of Florida and importing it into Rhode Island to distribute throughout the New England region. Part of it involved growing the stuff over in fields out in the woods some place in Rhode Island and part of it involved bringing it in by one way or another, including the *Dorchester,* the ship.

There was a shorefront summerhouse in the town of Jamestown, which is an island in the middle of the bay, and part of them were living there. Some of them were living in a motel near the airport.

Mr. CONYERS. Do they have criminal records?

Mr. ROBERTS. Some may have had minor criminal records involving possession of narcotics. None were known at that time, in my recollection.

Mr. CONYERS. They were not felons?

Mr. ROBERTS. Not prior to this business involvement, they were not felons of note. They were apparently—we came to find out as the case went on, that one way or another there was some organized crime involved. But that was not known until you got well

into it. One of the men who was a principal fell from the 32d floor of a hotel in New York City after two organized crime figures were seen going up in the elevator. It is one of those things that just kept unfolding. To tell the story accurately and fairly would take more time than the subcommittee would wish to indulge me.

The point was that we did in fact obtain some convictions, not resulting from the boat. We obtained some convictions of people in a motel room near the Providence Airport. We in fact lost other cases that weren't quite as dramatic as the evidence from the boat being suppressed; where quantities of drugs which were found in a hotel room or were on the person, in the pocketbook of the girlfriends of one of the accused, and things like that, they were in fact suppressed.

One of the effects of that was that that whole thing has made police departments a lot more wary than we feel they should be, about securing a warrant wherever practical. Any proposed modification of the exclusionary rule from my point of view or the point of view of the association I represent, does not suggest we want to encourage any lessening of the strict standards of law enforcement with respect to securing warrants. What we are talking about here is that case where justice simply is not done because of the unbending inflexible application of the exclusionary rule.

Mr. CONYERS. In your further illustration, how could the exclusionary rule operate against prosecution when a warrant was obtained? What happens there? You cited a case.

Mr. ROBERTS. There was in fact a warrant. The court——

Mr. CONYERS. That would make it valid?

Mr. ROBERTS. The court went to the issue of probable cause there. In other words, the Rhode Island Supreme Court reasoning in that case would kind of impute to the warrants the original legality of the stop and frisk, if you will. It wasn't stop and frisk in the literal sense but stopped when they noticed the fact that you had the alarm, the back end of the car dragging on the cobblestone street, and three guys in town, two of whom were known to be organized crime people. They held that was not probable cause to stop those guys. Then, as I recall, going forward with the warrant, the initial illegality negated the warrant.

Mr. CONYERS. Do you think that the outcome of that case turned on the exclusionary rule?

Mr. ROBERTS. Certainly the principal rationale of the court in that case turned on the exclusionary rule, yes sir.

Mr. CONYERS. Thank you very much.

Mr. Crockett.

Mr. CROCKETT. No questions, Mr. Chairman.

Mr. CONYERS. We thank you very much for joining us.

Mr. ROBERTS. Thank you, Mr. Chairman.

Mr. CONYERS. Our final witnesses are representing the American Bar Association; Professor Greenhalgh of Georgetown has been responsible for releasing on an unsuspecting public 615 new lawyers as of last week—perhaps that was this week—an offense for which there is no punishment, there is no offense even; in some areas of the public it is congratulated and encouraged.

So, we welcome Professor Greenhalgh and Ms. Laurie Robinson, Director of the ABA Criminal Justice Section, who have together

examined the subject of the exclusionary rule and their testimony will appear, without objection, in full in the record.

You may proceed in your own way.

TESTIMONY OF WILLIAM W. GREENHALGH, CHAIRPERSON, LEGISLATION COMMITTEE, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY LAURIE ROBINSON, DIRECTOR, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. GREENHALGH. First of all, Judge Crockett, welcome to the subcommittee where, I think under the eighth amendment, it might be cruel and unusual. We are very happy to have you here.

Ms. Robinson and I have appeared almost interminably before the subcommittee on various other issues. This is the first time we have had the privilege of being here dealing with the very important issue which is whether or not, first of all, Congress has the power to either abolish or modify the Federal fourth amendment exclusionary rule and the various bills that are presently resting in the bosom of the subcommittee.

I think, Mr. Chairman, with your permission, in order to avoid the other bills which are covered fairly well in our statement, I would like to get right to the issue of the Department's good-faith exception, which if you wish to follow generally is on page 7 of our statement. If there is anything, I would appreciate if we could announce here today there is a very important principle laid down by the Supreme Court of the United States in 1921 in one of its more famous cases, the case of *Felix Gouled,* in which on the last page of that opinion dealing with the motion to exclude the evidence which was unconstitutionally received in that case, there is the following sentence:

"A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

I think that it is terribly important that we never lose sight of that. That is still good law in this country. I think it is very important to find it on page 313 of the opinion. I cite it initially in the first part of this. But that is what a lot of these arguments are: whether or not Congress has the power as a result of this so-called mere rule of evidence, and which we very strongly believe, in all due respect, because of what has occurred since 1961 with the *Weeks* rule becoming a matter of due process, that you have lost that power and as a result you are somewhat like 21 years too late.

From our analysis, it appears the Department of Justice completely overlooked the law in this matter. For 100 years a majority of the Supreme Court of the United States has consistently rejected a good-faith test, starting back with *Stacey* v. *Emery* in 1878, and slowly forward, all of the way up to the most recent rendition, which is *Beck* v. *Ohio* in 1964.

I wish somebody would go to the congressional reference service and see if we are right, because right off the bat there has never been an opinion by a majority of the Court that endorses this concept. There have been justices from time to time in the sense of saying maybe good faith, maybe that. But there has never, in over 100 years, been a majority endorsing the good-faith test.

Second, the Department tried this 20 years ago in a case. Interestingly enough the Assistant Attorney General in charge of the Criminal Division at that time was Malcolm Wilkie. He is, of course, one of the great detractors of the exclusionary rule and testified over on the other side and has written a very large document concerning the modification of the exclusionary rule.

They raised this issue 20 years ago in their brief in the *Elkins* case. That was the case that overruled the Silver Platter Doctrine in 1960. Probably one of the great appellate lawyers of this country who was representing Mr. Elkins in that case, Frederick Bernays Wiener, on the middle of page 8, I thought put it about as well as it could be put in his reply brief to the Department's respondent's brief. I quote:

"We have no doubt that the Court will reject this all too obviously last-ditch alternative. A search is either valid or invalid; there is no middle ground. Close cases will of course arise in the future, as indeed they have in the past; but however difficult it may be to draw the line, a line must somewhere be drawn. An illegal search can no more be saved from condemnation by the apologetic comment that it is only slightly unconstitutional than an egg can be classed as edible simply because it is only slightly rotten."

The analogy, of course, is "close cases." In anticipation of this hearing, I am sure the Supreme Court beat you to the draw with the *Albert Ross* case decided yesterday.

First of all, the law is against the Department, as far as we can see, for over 100 years. That is the law, the Supreme Court of the United States.

Second, we are having a problem with regard to the injection of a new standard based on 67 years of experience of dealing with precedents and experience of Federal judges in working its will with regard to existing law interpreted by the Supreme Court.

Judge Crockett, I am sure you, having been a former trial judge yourself, understand the importance of building up case precedents and experience in all of the motions to suppress that you heard through your many years as a trial judge in Detroit.

If you substitute this new test known as good faith for the objectivity test which has been the law since 1914, you can rest assured that there is going to be some confusion with regard to the Federal courts. To do away with the standards of reasonableness as interpreted by the Supreme Court of the United States is going to develop a very chaotic state, especially in 94 U.S. district courts as well as the 12 circuits.

How many years will it take for this new standard to develop? You had one on the books interpreted by the Supreme Court of the United States since 1914. True, it was Federal in this exclusion from 1914 to 1961, some 63 cases decided. A couple of those were State. The egregious examples—the stomach pumping cases, *Rochin* v. *California*, *Wolf* v. *Colorado*—which then induced the due process, but not the imposition of the exclusionary rule in 1949.

I think that is a very important consideration for the subcommittee to face, and that is what is going to be the effect, if this bill should pass the U.S. Congress.

The concurring opinion in the infamous *Joann Williams* case down in the fifth circuit points this up. This whole issue was not very well argued in the fifth circuit.

Second, what precedents are being cited besides eggheads from law schools writing law review articles; and third, what is the importance of the effect of the case already in the mill? You would have to have some sort of effective date in order to try to clear all of this up.

Now, the Department doesn't seem to think it is very important that Federal law enforcement officers will be careless or suffer ignorance of the law based on a good-faith reception. We disagree. I think when Attorney General Sachs of Maryland comes before you shortly, his testimony will reflect very careful analysis of the level of training and education of Federal law enforcement officers, whether it be the FBI, the Postal Service, drug enforcement, and because of one thing, and that is the judicial implication of the fourth amendment exclusionary rule, which has had to raise to a very high level in Federal law enforcement.

That is something that you could require in asking these agencies how many hours specifically have to do with training and education with regard to the protection of the fourth amendment rights.

The other thing that concerns us is on the bottom of page 10, which is the third issue that we see. One of your bills that is pending in the subcommittee flatly abolishes all exclusionary rules, whether they be in violation of the fourth, fifth, or sixth amendment.

That is part of the problem. Once this begins, the slippery soap going down concerning modification or abolition with regard to the exclusionary rule, what next is around the corner? Will it be an attempt to do something with the privilege against self-incrimination?

Now, as we all know, *Brown* v. *Mississippi* was the first case which they threw out on this due process basis, the torture of Brother Brown and some of his colleagues at that time. They are going to try to abrogate the involuntariness test of confessions.

All of these things are beginning to take shape. There are 30 bills in the U.S. Congress, according to Senator Mathias, attacking the court's jurisdiction. This is a mere variation on that theme. We are not talking about busing and school prayer or abortion or anything like that. We are talking about the judicial implication of reinforcement of the constitutional right which the U.S. Department of Justice and others wish to limit in that regard.

Two other issues I would like to raise, and then I would be happy to answer questions.

There is another bill pending in the U.S. Senate which is the one which I think we can safely say is the most pernicious of them all. It was introduced by Senator DeConcini. Its number is S. 2304. It is a combination of the good-faith exception plus, and listen to this, the matter as to good faith, it still shall be admitted to avoid "a miscarriage of justice."

Now, that is a test? The amorphousness somewhat escapes me. If that comes out in the new crime bill, it may wind up here. I hope

the subcommittee will take a good look at what a miscarriage of justice means.

Second, I don't know what the Department is doing with regard to do they tell you the good-faith exception concerning the warrant clause and whether or not if you go get a warrant and the warrant is thrown out, it should still be admitted because it is the good-faith exception should be applied?

The subcommittee ought to be apprised of how many cases the Supreme Court of the United States has thrown out for violation of the warrant clause. Now, that means they are looking right in the face of existing Supreme Court law concerning the invalidity of either the issuance of arrest or search warrants. I will name those cases.

Ever since 1931 the Supreme Court has thrown out either for lack of probable cause or for violation of a particular aspect of the warrant clause the following cases: *Go-Bart, Grau, Sgro, Nathanson, Giordenello, Roy Jones, Aguilar, Stanford, Recznik, Spinelli, Whitley, Coolidge, Connally, Franks,* and *Lo-Ji Sales.* That is at least 15 cases where the Supreme Court declared unconstitutional invalid warrants arrest or search warrants.

For the Department to tell you that this is going to be the basis of a good-faith exception flies in the face of existing Supreme Court law.

The only other observation I would like to make is, I think, one of the most important considerations that is lost in all of these hearings, and that is the purpose for which the fourth amendment was promulgated in the summer of 1789 in New York City at the first session of Congress.

The Supreme Court has time and time again reiterated that reason. You will find on page 15, 14 cases we cited which stand for the important proposition, it is important to recognize the right to be secure guaranteed by the fourth amendment is not a right provided to those who break the law. It is a right guaranteed to all of the people, it protects everyone, those suspected or known to be offenders as well as the innocent.

The constitutional history between the times of the colonial opposition, with general warrants in England, would highly indicate it was to protect all of the people, not just those who break the law.

Mr. Chairman, with that I would be happy to answer any questions.

Mr. CONYERS. Thank you very much for a statement that will be very, very carefully scrutinized by this subcommittee.

Do you have any views about this public reaction that, according to some, fires the general population up to react against rules that either appear to or provide some way for criminals to avoid conviction?

Mr. GREENHALGH. I think when the following categories of individuals announce the exclusionary rule, the public is going to listen. We will start with the President of the United States of America. We will then move to the Vice President of the United States of America. We will then move to the Attorney General of the United States. We will then move to Mr. Jensen, who is an Assistant Attorney General of the Criminal Division of the U.S. Department of Justice.

One of the most outspoken critics is probably the closest person to the President, and that is the Counselor to the President, Mr. Meese, former law professor from California.

On the Senate side, you have a former prosecutor who has introduced two different bills, Senator DeConcini from Arizona, S. 101, which is a substantial violation test, as well as the other monstrosity known as S. 2304. You have all of these other Senators very much involved in it. They are all speaking out in the Congressional Record, some of them who are running for reelection.

There is no question about whether the criminal should go free because the constable has blundered. The issue is out there, and when you have powerful and important people in America speaking out on this issue that something must be done, the public will listen.

I think one of the great ironies of Mr. Roberts from the former Colony of Rhode Island, in the implementation of the Townshend Act of 1767 which required or gave power to the provincial judges, the Supreme Court judges of the Colony of Rhode Island, or Superior Judges, the power to issue writs of assistance, was the most resisting colony of all of the 13 not to issue the writs. They called the judges down before the General Assembly of Rhode Island to ask why they weren't. They said, "They are not common law search warrants. We have never seen anything like this. We are not going to issue them."

There we are. Mr. Roberts representing one of the most vocal resisting colonies.

I think this is part of the problem. The exclusionary rule, as I told you, is a variation which attacks court jurisdiction and is somewhat restrictive with regard to the admissibility of evidence.

Mr. CONYERS. Counsel Mike Ward.

Mr. WARD. Mr. Greenhalgh, I would like to pursue one of the questions I raised with Mr. Jensen.

If Congress were in fact to pass proposals such as the Department recommended, and that proposal went before the Supreme Court, I would assume that the Court would have only two options if it wanted to approve it. It could either say this is what we always intended, this is a constitutional rule, in which case there would have been no real necessity for Congress having acted anyway, or it would say this is an adequate substitute for the current exclusionary rule, which was never constitutionally mandated.

In the latter case, would this not, in your opinion, be a signal to the States that they could experiment with other possible alternatives, and get us back to where every jurisdiction had a different remedy for a fourth amendment violation?

Mr. GREENHALGH. They think they have five votes up there. There is no question. He can't tell you today that you all have the power unless the Supreme Court agrees with him, whether or not it is a 5-to-4 decision. No lawyer is going to tell you that, I don't think.

When the *Marbury* v. *Madison* case was decided, I think we talk about the supremacy clause in the Constitution that is the law as we have known it since 1803. The important thing is, if they are betting on having five votes, so be it; there is nothing much any of us can do.

But your point is very valid. We raise that in our statement. That is the exhumation of the silver platter doctrine because what will happen, you will have a lesser standard in operation in the Federal courts. We point that out. What you will have is a close case based on the so-called good-faith exception, and it could be a heavy State prosecution that could be involved.

They are going to take that evidence which can be admitted in Federal court and hand it over on a silver platter to the State prosecutor and say, "Do the best you can because it has already been admitted in the Federal court. Try to persuade one of the 50 States to follow the Federal, just the opposite of 1960 when it was overruled."

Second, the two States that have got in on this huge bandwagon going for good-faith exception are the States of Colorado and Arizona. Mr. Tooley, who is the distinguished district attorney of Denver and also sits on my council of the Criminal Justice Section of the ABA, is a marvelous, intelligent, affable human being. He rammed this through the State legislature, and the Governor signed it.

You talk to the judges where these motions appear, they are not implementing it. They are not moving on that exception, which is very peculiar. Maybe Mr. Tooley does not know what his assistant DA's are not doing. We have no experience in Arizona yet because of the most recent enactment of that. Arizona, of course, is where Senator DeConcini comes from, so you would expect that to be the reaction.

There may be one or two other States that have it or are thinking about it. One of the great States, one of the great resisting colonies, is the Commonwealth of Virginia. Their judicial proceedings committee in the general assembly threw it out on a very lopsided vote earlier. Maryland has not come anywhere near close to it.

I think the interesting thing is a lot of the Eastern States dealing with colonial oppression, concerning the writs of assistance and all of that, go back 200 years and feel very much stronger about this issue than anything west of the Mississippi.

But you are right. You will have a different standard, and that is going to provoke chaos.

Mr. WARD. Thank you.

Mr. CONYERS. Ms. Robinson.

Ms. ROBINSON. I have nothing further to add.

Mr. GREENHALGH. She wanted to remind me about the NIJ study. There is a slight inconsistency there. They want you to abolish the law and support it by some study for a quarter of a million dollars put out by the Department. You had one good one, the GAO study in 1979. You have two other prestigious reports supporting that.

If you want to, go out and spend a quarter of a million more in times like this, but for them to say that, you know, I think is slightly inconsistent.

Ms. ROBINSON. I would like to add that the INSLAW studies were not noted in the Department's statement, and as we pointed to in pages 24 and 25, they found of the nonfelony rejections less than 2 percent stem from due process violations. They fail to address that particular study in their testimony.

Mr. CONYERS. Thank you very much.

Attorney Smietanka.

Mr. SMIETANKA. I have no questions. Thank you very much.

Mr. CONYERS. That concludes the hearing this morning. We thank our witnesses for joining us.

The subcommittee stands adjourned.

[Whereupon, at 12:10 p.m. the subcommittee adjourned, to reconvene at the call of the Chair.]

[The complete statement of Professor Greenhalgh follows:]

PREPARED STATEMENT OF PROF. WILLIAM W. GREENHALGH, CHAIRPERSON, LEGISLATION COMMITTEE, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

The American Bar Association is pleased to appear before you to express our views on the subject of the Fourth Amendment exclusionary rule. As Chairperson of the ABA Criminal Justice Section's Legislation Committee and as Section Chairperson-Elect, I have been designated by ABA President David R. Brink to represent the Association.

My own background in the criminal justice area has included both prosecution and defense experience. I am presently a clinical professor of law at Georgetown University Law Center and have been Director of the E. Barrett Prettyman Program (L.L.M. in Trial Advocacy) since 1963. That program has represented over 2,000 indigents charged with felony offenses in the various courts of the District of Columbia. It has produced, among others, a book entitled, "Law and Tactics in Exclusionary Hearings" (Coiner Publications, 1969).

Before going to Georgetown, I worked as a staff attorney with the Justice Department's Internal Security Division, and served in the U.S. Attorney's Office in Washington, ending my tenure as Chief Assistant U.S. Attorney for the District of Columbia, General Sessions Division. I am presently writing a treatise on "The History and Development of the IVth Amendment Exclusionary Rule."

Just as the American Bar Association is, of course, reflective of the legal profession as a whole, so, I should note, is the Section of Criminal Justice representative of all segments of the criminal justice system. The Section is neither the voice of the defense bar nor the prosecution. Our members include prosecutors, criminal defense lawyers, public defenders, judges, law professors and law enforcement officials. We try to reflect that balanced view in policy positions which we adopt.

ABA POSITION SUPPORTS EXCLUSIONARY RULE

The American Bar Association has long supported retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. We continue to do so, and urge this Subcommittee to approach this issue cautiously -- and reject proposals to modify or eliminate the rule in criminal trial

proceedings. Despite the rhetoric prevalent today, its abolition will not stem the tide of crime in our country -- but tampering with it will destroy a portion of the cherished constitutional fabric of which our system is constructed.

The scholarly debate on the subject of the exclusionary rule has been extended and inconclusive. See, Oaks, Studying the Exclusionary Rule in Search and Seizure, 27 U. Chi. L. Rev. 665 (1970); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Stud. 243 (1973); Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 63 Ky. L.J. 681 (1974); Comment, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 NW. U.L. Rev. 740 (1974). United States v. Ross, No. 79-1624, Wilkey, J., dissenting op. at 48-63 (D.C. Cir. March 31, 1981). Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 337 (1978); Wilkey, A Call for Alternatives to the Exclusionary Rule: Let the Congress and the Trial Courts Speak, 62 Judicature 351 (1978).

For that reason, we believe it is most fruitful to focus on two aspects of this issue: What does the Constitution require, as reflected in the development of case law in this area? And what does the empirical evidence suggest as to the impact the exclusionary rule has had in case disposition? As to the first, we believe that pending legislation to modify or abolish the rule in federal criminal proceedings is unconstitutional, based on an analysis of relevant cases. As to the second, available statistics reveal that the rule has had little impact on case dispositions in the nation's courts. The data do not support the contention by many that hordes of criminals go free because of such "technicalities." Further, violent offenses account for only a tiny percentage of federal and state cases dropped because of the exclusionary rule.

From the Association's extensive criminal justice work, we recognize that there are no easy answers to crime -- something of which each member of your Subcommittee is well aware. In the midst of the current emotional climate, we must avoid adoption of apparently simple solutions to crime which not only pose constitutional problems, but also offer false promises. We do not believe that elimination or modification of the exclusionary rule is an effective tool for solving the crime problem in America.

Let us turn now to the first prong of our analysis -- an examination of what the Constitution requires, as interpreted by the United States Supreme Court.

AN EXAMINATION OF CASE LAW SHOWS THAT THE RULE IS CONSTITUTIONALLY MANDATED

We believe it useful to couch our discussion in terms of several bills now pending in the Congress to abolish or modify the exclusionary rule. These are H.R. 4259, introduced by Mr. Beard, which would nullify any constitutionally mandated exclusionary rule in federal criminal proceedings; and S. 101, sponsored by Senator DeConcini, with no current House counterpart, which would substantially modify the Fourth Amendment by allowing admission of evidence obtained in violation of the Fourth Amendment unless the violation was intentional or substantial. H.R. 5971 (sponsored by Mr. Sawyer and Mr. Hughes), H.R. 6049 (introduced by Mr. Lungren), and H.R. 4422 (introduced by Ms. Fiedler) are bills embodying various ways to create a "good faith" exception to the exclusionary rule.

Since February of 1973, the American Bar Association has been firmly and publicly opposed to legislative efforts to limit the exclusionary rule. That policy was taken in reaction to S. 2657 (92nd Congress), introduced by Senator Bentsen in 1971. S. 2657 combined features now found in both H.R. 4259 and S. 101. Their aims are substantially similar.

OUTRIGHT NULLIFICATION

Bluntly put, 18 U.S.C. §3505 as proposed in H.R. 4259 is intended to nullify

the federal Fourth Amendment rule of evidence, as well as the Fifth (privilege against self-incrimination) and Sixth (assistance of counsel) Amendments. We do not believe Congress has the constitutional authority to abolish the exclusionary rule. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. Gouled v. United States, 255 U.S. 298, 313 (1921). What was once a mere federal rule of evidence in 1914 became a cloth scotch-guarded with the impregnability of constitutional enforcement in 1961.

As Mr. Justice Day historically declared in Weeks v. United States, 232 U.S. 383 (1914) at 391 and 392:

> In the Boyd case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trial, 1029, Mr. Justice Bradley said (630):
>
> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.
>
> It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. (emphasis added)
>
> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under

> the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

H.R. 4259, which is destructive of Fourth Amendment rights, similarly should find no sanction in Congressional enactment.

When the Supreme Court of the United States held in Mapp v. Ohio, 367 U.S. 643 (1961), that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments, it constitutionally proscribed the Congress from revoking or rescinding the exclusionary rule in the administration of the American criminal justice system.

It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. Almeida-Sanchez v. United States, 413 U.S. 266, 372 (1973). Only the Supreme Court has the authority to remove or reduce the application of the exclusionary rule. United States v. Calandra, 414 U.S. 338 (1974) (federal grand jury proceedings); United States v. Janis, 428 U.S. 433 (1976) (federal civil proceedings); Stone v. Powell, 428 U.S. 465 (1976)(federal habeas corpus relief); United States v. Ceccolini, 435 U.S. 268 (1978)(attenuation); United States v. Crews, 445 U.S. 463 (1980)(in-court identification); United States v. Havens, 446 U.S. 620 (1980)(impeachment); United States v. Salvucci, 448 U.S. 83 (1980)(standing). Proposed §3505 in H.R. 4259 is, therefore, patently unconstitutional in our view.

SUBSTANTIAL VIOLATION SUBSTITUTE

A less radical proposal presently pending before the Senate is S. 101.* It is calculated to retain the federal exclusionary rule only in cases where there

* As noted before, there is currently no House counterpart.

is an "intentional or substantial" violation of the Fourth Amendment. The criteria enumerated in the bill as to a determination of substantiality -- recklessness, privacy invasion, deterrence, inevitable discovery, or attenuation -- would, in fact, provide a federal court with a basis for allowing admission of virtually all illegally seized evidence.

By even attempting to limit the application of the federal exclusionary rule -- which is now a matter of due process -- S. 101 purports to permit what the Fourth Amendment prohibits. It is thus facially violative. Torres v. Puerto Rico, 442 U.S. 465 (1979); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Berger v. New York, 388 U.S. 41 (1967); cf. Camara v. Municipal Court, 387 U.S. 523 (1967); Sibron v. New York, 392 U.S. 40 (1968); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Marshall v. Barlow's Inc., 436 U.S. 307 (1978); Brown v. Texas, 443 U.S. 47 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). It plainly violates constitutionally mandated guarantees.

S. 101 is facially void for another reason. It abolishes the standard of reasonableness. As Mr. Justice Clark, speaking for eight members of the Court, said in Ker v. California, 374 U.S. 23 at 33-34 (1963):

> We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. See, e.g., Spano v. New York, 360 U.S. 315, 316 (1959); Thomas v. Arizona, 356 U.S. 390, 393 (1958); Pierre v. Louisiana, 306 U.S. 354, 358 (1939). While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the records so that it can determine for itself

> whether in the decision as to reasonableness the fundamental — i.e., constitutional — criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. (emphasis added)

Thus, S. 101 contemplates the substitution of a "substantial violation" test, which has never been followed by a majority of the Supreme Court.

In fact, Mr. Justice Frankfurter, in an internal memorandum to the majority in the Silver Platter cases dated April 13, 1960 suggested that "a searching inquiry by the Committee [Committee on Criminal Rules] may lead it to propose a qualified rather than an absolute exclusionary rule, restricted to clear and flagrant cases and not to the infrequent instances where 'the constable has blundered.'" The majority in Elkins v. United States, 364 U.S. 206 (1960) flatly rejected this proposal, since the opinion written by Mr. Justice Stewart reflects no such language.

"GOOD FAITH" EXCEPTION

A third, and perhaps more venturesome, proposal to limit the application of the exclusionary rule may be found in the Department of Justice recommendation to the Congress that evidence obtained in the course of a reasonable, good faith search should not be excluded from federal criminal trials. The Department's position is reflected in H.R. 5971 and H.R. 6049. A variation is found in H.R. 4606, introduced by Mr. Collins.

The American Bar Association strenuously opposes these recommendations. Our reasons are several. First, for over 100 years a majority of the Supreme Court of the United States has consistently rejected the so-called "good faith" test. Stacey v. Emery, 97 U.S. 642 (1878); Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28 (1923); Carroll v. United States, 267 U.S. 132, 162 (1925);

Henry v. United States, 361 U.S. 98, 102 (1959). Objectivity, not subjectivity, is the rule of law.

Also, it is interesting to note that over 20 years ago the Justice Department raised the "good faith" exception. They argued in their brief at p. 68 in the Elkins case that "evidence should not be barred which was obtained by state officers acting in good faith but mistakenly failing to comply with all the legal requirements. Only that evidence would be barred which was obtained by intentional or clear violation of constitutional rights." Counsel for petitioner in his reply brief at p. 18 put it this way:

> We have no doubt that the Court will reject this all too obviously last-ditch alternative. A search is either valid or invalid; there is no middle ground. Close cases will of course arise in the future, as indeed they have in the past; but however difficult it may be to draw the line, a line must somewhere be drawn. An illegal search can no more be saved from condemnation by the apologetic comment that it is only slightly unconstitutional than an egg can be classed as edible simply because it is only slightly rotten.

Congress should find the proposal equally difficult to swallow.

Perhaps it was best said by Mr. Justice Stewart in Beck v. Ohio, 379 U.S. 89 (1964) at 97:

> We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough." Henry v. United States, 361 U.S. 98, 102...if subjective good faith alone was the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. [emphasis added].

To say that the proposed "good faith" exception is "a workable rule governing arrests, searches and seizures" is to stand the Fourth Amendment on its head.

Second, in 67 years, federal trial judges have been interpreting a standard of reasonableness predicated on the accumulated wisdom of precedent and experience in every evidentiary hearing in which they have presided pursuant to Rule 12(b)(3)

of the Federal Rules of Criminal Procedure (or its equivalent prior to 1946). At all times, an objective standard has been the test by which they have scrutinized the admissibility of evidence.

In Delaware v. Prouse, 440 U.S. 648 (1979) at 653-654, Mr. Justice White put it rather simply:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law-enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions." (citations omitted) Thus, the permissibility of a particular law-enforcement practice is judged by balancing its instructions on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause, or a less stringent test. (footnotes omitted)

In the same term, the Court reiterated its stress on objectively reasonable standards in Dunaway v. New York, 442 U.S. 200, 209 N. 11 (1979). Prouse was decided by 8-1 and Dunaway by 6-2 (with Justice Powell not sitting).

Assuming arguendo that Congress should enact the subjective "good faith" test to supplant the objective standard of reasonableness and the Supreme Court determines it to be constitutional, the effect in Rule 12(b)(3) evidentiary hearings in the 94 United States District Courts would be devastating. Federal law enforcement officers would undoubtedly be permitted to testify not only as to their state of mind regarding "good faith," but probably to give opinion testimony as well. With the burden of proof on the prosecution at the lowest rung of the evidentiary ladder — mere preponderance of the evidence to establish the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the Fourth Amendment — the Sixth Amendment adversary factfinding process in Federal courts would become a farce and mockery of justice.

Further, we contend that interpretation by the courts of a new "good faith" exception will engender years of litigation, excerbating the problems already facing busy federal trial courts. It also will promote federal law enforcement carelessness, as well as suffer ignorance of the law.

To illustrate our position more fully, the rather cogent concluding paragraph in Hoopes, "The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the §1983 Good Faith Defense: Problems and Prospects," 20 Ariz. L. Rev. 915, (1979) states at 951:

> If the more salient problems of burdens of proof and workable standards for the determination of when the officer's intent may be judged culpable can be resolved, a properly defined and focused good faith test for exclusion could well provide a rational and effective means of protecting those rights provided for in the fourth amendment. Nevertheless, although the good faith test would appear to make no substantive changes in exclusionary rule analysis, if the Supreme Court draws heavily on the civil history of the good faith standard, the result may be an analysis that focuses disproportionately on the officer's assessment of the facts. This result seems inconsistent with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer. (emphasis added)

Only retention of the objective standard of reasonableness can secure Fourth Amendment rights.

Third, we offer a further observation. If the Congress should enact the "good faith" test in the Fourth Amendment context, would not, as Senator Mathias asked in a hearing on October 5, 1981, there be a movement to consider a legislation to condone "good faith" violations of First Amendment rights? Taking it two additional steps further, would this lead to proposals to eliminate the Fifth Amendment privilege against self-incrimination by supplanting the totality of circumstances test of confessional voluntariness -- or the Sixth Amendment prohibition against the use of statements taken from an accused in the absence of counsel? As Mr. Justice Bradley warned almost 100 years ago,

in Boyd v. United States, 116 U.S. 616 (1886) at 635:

> Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.

So should Congress be as vigilant in the protection of the rights of the individual.

DUE PROCESS SUBSTITUTE

H.R. 4422 is perhaps the most troublesome bill. It is apparently an attempt to enforce the Fourteenth Amendment in the states by substituting a tort remedy for the existing exclusionary rule. The effect of this legislation would be to negate the Mapp decision. This Congress cannot do. The Supreme Court has spoken and has declared Mapp the law of the land. This is not legislation under §5 of the Fourteenth Amendment to enforce the rights therein guaranteed. It provides for just the opposite. Mr. Justice Frankfurter in Wolf v. Colorado, 335 U.S. 25, 33 (1949) neatly disposed of this proposition. Abolition is tantamount to negation and therefore is unconstitutional.

SUPREME COURT'S CAUTIOUS COURSE

Before Congress rushes into this constitutional thicket, one should reflect that the Supreme Court did not act hastily in imposing the federal exclusionary rule of evidence as a constitutional requirement binding on the states. During the 47 years between Weeks and Mapp, the Court construed some 60 Fourth Amendment cases, ruling for the government in over half of them. It is significant that the Court, after announcing its decision in Wolf v. Colorado, 338 U.S. 25 (1949), as to future enforceability of the federal constitutional rule on the states, waited another 12 years for decisional imposition. During this period, the Court permitted the states to experiment as "laboratories" with alternative remedies to the exclusionary rule.

Five years after Wolf, in a vigorously contested 5-4 decision, the Court in Irvine v. California, 347 U.S. 128 (1954), was again presented with the opportunity to impose Weeks on the states. Even though the facts were egregious -- breaking and entering a home, secreting an eavesdropping device, and listening to conversations of the occupants for over a month -- the Court declined to overrule Wolf. As Mr. Justice Jackson said at 134:

> Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.

The majority was patient, the minority perturbed.

More significant, perhaps, was the statement of the ultimate author of Mapp, Justice Clark, in his concurring opinion in Irvine at 138-139:

> Had I been here in 1949 when Wolf was decided, I would have applied the doctrine of Weeks v. United States, 232 U.S. 383 (1914), to the states. But the Court refused to do so then, and it still refuses today. Thus Wolf remains the law and, as such, is entitled to the respect of this court's membership.
>
> Of course, we could sterilize the rule announced in Wolf by adopting a case-by-case approach to due process, in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell -- other than by guesswork -- just how brazen the invasion of the intimate privacies of one's

> home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. Rochin bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions. I do not believe that the extension of such a vacillating course beyond the clear cases of physical coercion and brutality, such as Rochin, would serve a useful purpose.
>
> In light of the "incredible" activity of the police here, it is with great reluctance that I follow Wolf. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance. (emphasis added)

Justices Black at 139-142, Frankfurter joined by Burton at 142-149, and Douglas at 149-152 were far less respectful of the Court's membership.

In any event, during the last five years before the Court decided in Mapp that the Fourth was enforceable through the Fourteenth Amendment, they were busily rehearsing for redintegration. They were formulating fundamental criteria in the federal arena. Giordenello v. United States, 357 U.S. 480 (1958)(sufficiency of probable cause for federal arrest warrants); Draper v. United States, 358 U.S. 307 (1959)(sufficiency of probable cause for federal warrantless arrests); Henry v. United States, 361 U.S. 98 (1959)(federal point of arrest); and Jones v. United States, 362 U.S. 257 (1960)(sufficiency of probable cause for federal search warrants). Uniformity awaited inevitability.

At the same time, the Court was tightening the noose of federal exclusion by drastically limiting the use of illegally seized federal evidence in state criminal proceedings. Rea v. United States, 350 U.S. 214 (1956)(federal injunction against transferring to state authorities illegally seized federal evidence);

Benanti v. United States, 355 U.S. 96 (1957)(state wiretap evidence violative of federal wiretap statute inadmissible in federal court).

Finally, the silver platter doctrine -- allowing federal courts to admit evidence illegally seized by state officers -- came under scrutiny once again. The flame that had kindled the fire that forged the doctrine was extinguished in Elkins v. United States, 364 U.S. 206 (1960), overruling Lustig v. United States, 338 U.S. 74 (1949), which was decided on the same day as Wolf. It was now but a question of time before Justice Clark would constitute the majority in overruling Wolf. He emphatically did so in less than a year when, in Mapp, he made the federal exclusionary rule binding upon the states. The last paragraph of his constitutionally mandated decision perhaps says it best:

> The ignoble shortcut to conviction left open to the state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. (emphasis added)

Thus, Weeks, through the Due Process Clause, became the law of the land.

THE EXCLUSIONARY RULE EXTENDS TO THE INNOCENT AND GUILTY ALIKE

It is important to recognize that the right to be secure guaranteed by the Fourth Amendment is not a right provided only to those who break the law. It is a right constitutionally guaranteed to all the people. It protects everyone -- those suspected or known to be offenders -- as well as the innocent. Weeks v.

United States, 232 U.S. 383, 392 (1914); Gouled v. United States, 255 U.S. 298, 307 (1921); Agnello v. United States, 209 U.S. 20, 32 (1925); Byars v. United States, 273 U.S. 28, 29 (1927); Merron v. United States, 275 U.S. 192, 196 (1927); Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Grau v. United States, 287 U.S. 124, 128 (1932); Sgro v. United States, 287 U.S. 206, 210 (1932); United States v. DiRe, 332 U.S. 581, 595 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948); Trupiano v. United States, 334 U.S. 699, 709 (1948); McDonald v. United States, 335 U.S. 451, 453 (1948); Brinegar v. United States, 338 U.S. 160, 176 (1949). It is the innocent victim of an illegal search and seizure upon whom we should focus constitutional protection. But we do this by retaining the exclusionary rule.

The exclusionary rule safeguards us in many ways: It protects our "persons," while walking, talking or traveling. United States v. DiRe, 332 U.S. 581 (1948); Rochin v. California, 342 U.S. 165 (1952); Giordenello v. United States, 357 U.S. 480 (1958); Henry v. United States, 361 U.S. 98 (1959); Elkins v. United States, 364 U.S. 206 (1960); Wong Sun v. United States, 371 U.S. 471 (1963); Beck v. Ohio, 379 U.S. 89 (1964); Katz v. United States, 389 U.S. 347 (1967); Simmons/Garrett v. United States, 390 U.S. 377 (1968); Sibron v. New York, 392 U.S. 40 (1968); Davis v. Mississippi, 394 U.S. 721 (1969); Whiteley v. Warden, 401 U.S. 560 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Brignoni-Ponce, 422 U.S. 872 (1975); Delaware v. Prouse, 440 U.S. 648 (1979); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Texas, 443 U.S. 47 (1979); Reid v. Georgia, 448 U.S. 438 (1980).

It secures our sanctuaries, whether they be "houses," Weeks v. United States, 232 U.S. 383 (1914); Agnello v. United States, 269 U.S. 20 (1925); Byars v. United States, 273 U.S. 28 (1927); United States v. Berkeness, 275 U.S. 149 (1927); Taylor v. United States, 290 U.S. 41 (1933); Trupiano v. United States, 334 U.S.

699 (1948); Kremen v. United States, 353 U.S. 346 (1957); Jones v. United States, 357 U.S. 493 (1958); Silverman v. United States, 365 U.S. 505 (1961); Mapp v. Ohio, 367 U.S. 643 (1961); Fahy v. Connecticut, 375 U.S. 85 (1963); Clinton v. Virginia, 377 U.S. 158 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); Stanford v. Texas, 379 U.S. 476 (1965); James v. Louisiana, 382 U.S. 36 (1965); Camara v. Municipal Court, 387 U.S. 523 (1967); Bumper v. North Carolina, 391 U.S. 543 (1968); Recznik v. City of Lorain, 393 U.S. 166 (1968); Stanley v. Georgia, 394 U.S. 557 (1969); Chimel v. California, 395 U.S. 752 (1969); Von Cleef v. New Jersey, 395 U.S. 814 (1969); Shipley v. California, 395 U.S. 818 (1969); Vale V. Louisiana, 399 U.S. 30 (1970); Connally v. Georgia, 429 U.S. 245 (1977); Riddick v. New York, 445 U.S. 573 (1980); Steagald v. United States, 101 S.Ct. 1642 (1981).

Or apartments, McDonald v. United States, 335 U.S. 451 (1948); Chapman v. United States, 365 U.S. 610 (1961); Riggan v. Virginia, 384 U.S. 152 (1966); Spinelli v. United States, 303 U.S. 410 (1969); Mincey v. Arizona, 437 U.S. 385 (1978); Franks v. Delaware, 438 U.S. 158 (1978); Payton v. New York, 445 U.S. 573 (1980).

Or hotel rooms, Johnson v. United States, 333 U.S. 10 (1948); Lustig v. United States, 338 U.S. 74 (1949); United States v. Jeffers, 342 U.S. 48 (1951); Stoner v. California, 376 U.S. 483 (1964).

Or places of business, Silverthorne Lumber Co. v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Go-Bart Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); Sgro v. United States, 287 U.S. 206 (1932); Marcus v. Search Warrant, 367 U.S. 717 (1961); See v. City of Seattle, 387 U.S. 541 (1967); Berger v. New York, 388 U.S. 41 (1967); Mancusi v. DeForte, 392 U.S. 364 (1968); Colonnade Catering Co. v. United States, 397 U.S. 72 (1970); G.M. Leasing Co. v. United States, 429 U.S. 338 (1977); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978);

Tyler v. Michigan, 436 U.S. 499 (1978); Lo-Ji Sales Co. v. New York, 442 U.S. 319 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). Absent exigent circumstances or consent, the threshold may not be reasonably crossed without a warrant.

The rule also protects our "effects." Gambino v. United States, 275 U.S. 310 (1927); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Chadwick, 433 U.S. 1 (1977); Torres v. Puerto Rico, 442 U.S. 465 (1979); Arkansas v. Sanders, 422 U.S. 753 (1979); Robbins v. California, 101 S.Ct. 2841 (1981). America is a mobile society, and while we are obedient to the law, the Constitution guarantees us this.

PUBLIC POLICY MILITATES AGAINST ANY LESSER STANDARD

Besides the constitutional argument that Congress does not possess the authority to nullify the federal exclusionary rule, public policy alone militates against consideration of the proposed legislation. Bluntly, it would exhume the silver platter doctrine, quietly laid to rest in Elkins, and thereby destroy any semblance of uniformity of Fourth Amendment decisional law in all criminal proceedings, whether federal or state. State prosecutors, having cause to believe that they cannot meet the Mapp/Ker standard of reasonableness, could hand over to the Justice Department illegally seized evidence for use in federal prosecutions. Federal prosecutors, in turn, could persuade a federal court, under any lesser standard, to admit the unconstitutionally seized evidence in the federal prosecution.

Conversely, under any lesser standard, having persuaded a federal court to admit such evidence, the federal prosecutor could hand evidence over to a state prosecutor, since it had been admissible in a federal court; state prosecutors could then try to persuade state courts that, if it were admissible in federal court, it should likewise be admissible in a state court. Chaos would result.

The following analysis by Justice Douglas, joined in by Chief Justice Warren and Justice Brennan in dissenting in Wilson v. Schnettler, 365 U.S. 381, 397-398, is pertinent:

> When we forsake Rea v. United States and tell the federal courts to keep hands off, we wink at a new form of official lawlessness. Federal officials are now free to violate the Federal Rules that were designed to protect the individual's privacy, provided they turn the evidence unlawfully obtained over to the States for prosecution. This is an evasion of federal law that has consequences so serious that I must dissent. This case may be inconsequential in the tides of legal history. But the rule we fashion is an open invitation of federal officials to "flout" about the search warrants required by the Fourth Amendment, to break into homes willy-nilly, and then to repair state courts. Their evidence, unlawfully obtained by the standards that govern federal officials, may be used against the victim. A few states have exclusionary rules as strict as those commanded by the Fourth Amendment. Many permit the use in state prosecutions of evidence which would be barred if tendered in federal prosecutions. The tender regard which is expressed for federal-state relations will in ultimate effect be a tender regard for federal officials who flout federal law. Today we lower federal law enforcement standards by giving federal agents carte blanche to break down doors, ransack homes, search and seize to their heart's content — so long as they stay away from federal courts and do not try to use the evidence there. This is an invitation to lawlessness which I cannot join. (footnotes omitted)

If one were merely to substitute the words "federal courts" for either "federal officials" or "agents" — which would be the result of any proposed lesser standard -- one can readily see the invitation to lawlessness, the future of which Justice Douglas correctly portended. It also forbodes ill for decisional uniformity among the 50 states.

An additional public policy argument against these proposals arises in another context: the interpretation by the 94 U.S. District Courts and 12 U.S. Courts of Appeals of Fourth Amendment cases predicated on a less-than-reasonableness standard. In other words, should federal courts prospectively admit evidence seized in such egregiously abusive circumstances as the Supreme

Court has decisionally forbidden?

°arrests at will of anyone with only a previous criminal record (Beck);
°dragnet arrests (Davis);
°arrests for investigation (Brown v. Illinois);
°"pick up and bring in" arrests (Dunaway);
°unreasonable stop and frisks (Sibron);
°stops based on skin color alone (Brignoni-Ponce);
°random auto stops (Prouse);
°unreasonable stop and identify cases (Brown v. Texas);
°warrantless sanctuary seizures (Payton/Riddick/Steagald);
°coercive consent searches (Bumper).

The answer should be no, since all these cases were decided post-Mapp.

Twenty years have passed since the U.S. Supreme Court constitutionally mandated the federal exclusionary rule in Mapp. During this period of time, the Court has decided 45 federal cases touching on the rule, holding for the government in 32. On the other hand, with regard to enforcing Fourth Amendment rights through the Fourteenth Amendment in state criminal proceedings, out of 77 cases, it only held for the prosecution 20 times. Federal law enforcement has come a long way toward living and working within the framework of the rule.

ABOLITION OF THE RULE WOULD NOT ENSNARE MANY CRIMINALS NOW GOING FREE

To say that the federal exclusionary rule has not worked is to ignore human experience. It has contributed to substantial law reform by federal authorities. It has increased the professionalism of federal law enforcement officers. It has vastly enhanced the integrity of the federal judicial process.

But perhaps most importantly, empirical evidence reveals that the operation of the rule has not greatly affected case disposition. The overwhelming percentage of guilty pleas and convictions in federal courts provides ample proof that the rule has not stultified either federal law enforcement or the judiciary.

Opponents of the exclusionary rule and many citizens believe the rule results in legions of criminals going free on "technicalities." Evidence from a recent General Accounting Office report strongly suggests otherwise. See Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. GGD-79-45 (19 April 1979). The report

outlines evidence obtained from a survey conducted between July 1 and August 31, 1978 in 38 U.S. Attorneys' Offices. Some 2,804 cases were evaluated. Sixteen percent of defendants whose cases were accepted for prosecution filed some type of suppression motion; 55% of these motions cited the Fourth Amendment. The overwhelming majority of motions for suppression in which hearings were held were denied. Overall, in only 1.3% of the 2,804 cases was evidence excluded as a result of filing a Fourth Amendment motion.

But were many cases dropped by the prosecutor because of search and seizure problems? The answer is no. Only 4/10 of 1% of the declined defendants' cases were turned down due to Fourth Amendment search and seizure problems, the GAO study reported.

Further evidence can be found in two studies of state cases from the prestigious Institute for Law and Social Research. In a May, 1978 study, "What Happens after Arrest?", INSLAW researchers reported "a low rate of rejections at screening due to improper police conduct. Less than 1% of all arrests were refused by the prosecutor with an indication that the police failed to protect the arrestee's right to due process (e.g., no probable cause for making the arrest, unlawful search for and seizure of evidence...)." And of the 8,766 arrests examined in the INSLAW study that were dismissed by the prosecutor after initial acceptance, due process problems constituted but a small part -- 2%.

A second INSLAW study is also revealing. Issued in April, 1979, it is entitled, "A Cross-City Comparison of Felony Case Processing." While noting that the exclusionary rule and other related issues have stirred much debate among both scholars and criminal justice practitioners, and acknowledging that the rule may legitimately be the subject of extended debate over legal philosophies, the study found that due process reasons appeared to have "little impact on the overall flow of criminal cases after arrest."

Due process reasons were responsible for only a tiny portion of the

rejections of cases at screening in most jurisdictions — 1% in Washington, D.C., 2% in Salt Lake City, 4% in Los Angeles, 9% in New Orleans. The study goes on to point out that the data "seem to counter the conventional wisdom that Supreme Court decisions cause many arrests to fail because of technicalities. In fact, in the jurisdictions [studied], only one homicide arrest was rejected for due process reasons, and no rapes were rejected for these reasons." Drug cases accounted, not unexpectedly, for most of the due process-related rejections. In non-felony cases, less than 2% of the rejections in each city stemmed from due process violations.

Under these circumstances, is the effort to nullify or severely limit the exclusionary rule necessary? Would its abolition result in many more cases being pursued? The data do not suggest so.

Two additional points are worth noting. First, the proponents of the legislation have failed to offer any empirical data to demonstrate a connection between the exclusionary rule's existence and the crime rate. Second, it appears that the U.S. Department of Justice itself must have some doubts — it is about to fund a research study, through the National Institute of Justice, to examine the impact of the rule. It is curious that at a time it is raising these questions for academic study, on the one hand, that it is firmly asserting that changes in the rule are essential, on the other.

Discontent with the outcome of one or two well-publicized cases in which suppressed evidence has resulted in a criminal going free — and one can always come up with these "horror stories" — is no reason to tamper with constitutionally guaranteed rights.

CONCLUSION

Despite the rhetoric, there is no demonstrated connection between the increase in crime and the existence of the exclusionary rule. Lawbreakers do not read the Supreme Court advance sheets; and the empirical evidence does not

support the thesis that many cases are either lost or dropped because of search and seizure problems.

Efforts to abolish or narrow the exclusionary rule are unconstitutional, unwarranted and unnecessary.

The American Bar Association joins with members of this Administration and the Congress in recognizing the need to undertake concerted and effective measures to reduce crime in America. We have joined in endorsing a number of the Administration's proposed measures to achieve that end. The exclusionary rule, however, provides an easy target for many who are -- understandably -- fed up with the crime problem today. But Congressional changes in the Rule will undercut law enforcement professionalism, engender decades of litigation over various new tests, and result in very few additional criminals ending up behind bars.

And, in the bargain, we will -- perhaps forever -- have casually tossed aside a valued constitutional protection on which this country was founded.

# # # #

ATTACHMENT: APPENDIX A - 1973 ABA EXCLUSIONARY RULE POLICY

APPENDIX A
Approved ABA House of Delegates
Midyear Meeting, 1973

AMERICAN BAR ASSOCIATION

SECTION OF CRIMINAL LAW

RECOMMENDATIONS

The Section of Criminal Law recommends adoption of the following Resolutions:

BE IT RESOLVED, That the American Bar Association oppose, in principle, Senate Bill No. 2657, 92d Congress, 1st Session, as amended, entitled A Bill "To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal Criminal proceedings"; and

BE IT FURTHER RESOLVED, That the American Bar Association affirm its support of the exclusionary rule in State and Federal criminal proceedings; and

BE IT FURTHER RESOLVED, That the Chairman of the Section of Criminal Law, or his designee, be authorized to appear before appropriate committees of the Congress in order to communicate the Association's opposition to said legislation and the reasons therefor.

REPORT

Introductory. Senate Bill No. 2657 was introduced by Senator Lloyd Bentsen, of Texas, October 6, 1971, and referred to the Committee on the Judiciary. In view of the brevity of the bill and to facilitate action upon these recommendations, the bill is being quoted in its entirety, as follows:

"A BILL

"To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 223 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"'§ 3505. Definition and limitation of exclusionary rule

"'(a) Evidence shall not be excluded from any Federal criminal proceeding solely because that evidence was obtained in violation of the fourth amendment of the Constitution, unless the court finds, as a matter of law, that such violation was substantial.

"'(b) In determining whether a violation is substantial for the purposes of this section, the court shall consider all of the circumstances, including--

"(1) the extent of deviation from sanctioned conduct;

"(2) the extent to which the violation was willful;

"(3) the extent to which privacy was invaded;

"(4) the extent to which exclusion will tend to prevent such violations;

"(5) whether, but for the violation, the things seized would have been discovered; and

"(6) the extent to which the violation prejudiced the defendant's ability to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

"'(c) The analysis of such chapter is amended by adding at the end thereof the following new item:

"3505. Definition and limitation of exclusionary rule."'"

S. 2657 was amended by Senator Bentsen December 13, 1971, as follows:

"At the end of the bill, add the following new sections:

"SEC. 2. (2) Title 28, United States Code, is amended by adding after chapter 171 the following new chapter:

"'Chapter 172.--ILLEGAL SEARCH AND SEIZURE

"'Sec.
"'2691. Definitions.
"'2692. Tort claims; illegal search and seizure.
"'2693. Judgment as a bar.
"'2694. Attorney fees; penalty.

"'§ 2691. Definitions

"'As used in this chapter and sections 1346(f) and 2401(b) of this title, the term--

"'(1) "Federal agency" includes the executive departments, military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States; and

"'(2) "employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"'§ 2692. Tort claims; illegal search and seizure

"'(a) The United States shall be liable for an illegal search and seizure conducted in violation of the Constitution by any employee of the Government, or by any person acting under him, or at his direction or request, or by any person whose compensation is paid in whole or in part by the United States.

"'(b) Punitive damages may be recovered against the United States in a civil action undertaken pursuant to this section. No award, compromise, or settlement of the civil action brought under this section shall exceed the amount of $25,000, including actual and punitive damages.

"'§ 2693. Judgment as a bar

"'The remedy against the United States provided by this chapter for an illegal search and seizure shall be exclusive of any other civil action or proceeding by reason of the same subject matter against any of the persons described in section 2692 whose act or omission gave rise to the claim.

"'§ 2694. Attorney fees; penalty

"'(a) An attorney shall not charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(f) of this title.

"'(b) Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year or both.'.

"(b) The analysis of part VI of such title 28 is amended by adding immediately after item 171 the following new item:

"'172. Illegal Search and Seizure.....2691'.

"SEC. 3. Section 1346 of title 28, United States Code, is amended by adding immediately after subsection (e) the following new subsection:

"'(f) The district courts, together with the United States Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, brought under chapter 172 of this title.'

"SEC. 4. The civil action against the United States provided by the amendments to title 28, United States Code, made by this Act shall only apply to claims arising on or after the date of enactment of this Act."

"On page 2, line 15, insert quotation marks after the period.

"On page 2, line 16, strike out the quotation marks and '(c)' and insert in lieu thereof '(b)'

"Amend the title so as to read: 'A bill to amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings, and to amend title 28, United States Code, to extend the tort liability of the United States'."

According to remarks reprinted in the Congressional Record for the Senate October 6, 1971, Senator Bentsen was at least motivated in part by statements of Chief Justice Burger's dissent in the case of Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (9 CLR 3195 at 3202-3207) when he stated:

"Recently, in his opinion in the Bivens case, Chief Justice Burger challenged the Congress to take up the problems posed by the exclusionary rules and to provide some legislation.

"This is exactly what my bill intends to do. It would provide the courts with an opportunity to weigh the gravity of the crime charged to a defendant and then consider the seriousness and circumstances of the offense in seizing or searching for evidence. The court would then make a relative decision on the admissibility of the evidence involved.

"In substance, I propose that the courts be given greater latitude in decisions on admissibility of evidence."

The Section of Criminal Law initially submitted a report in opposition to the principle of Senate Bill No. 2657 which was intended to be on the calendar of the House of Delegates at the February, 1972, Midyear Meeting. At the time the Council of the Section acted on this matter (November 13, 1971), the amendments had not been offered. Consequently, the Board of Governors recommended that the report be returned to the Section for further consideration in the light of the amendments; and the Section, in agreement with the Board's recommendation, withdrew the report.

Thereafter, at its Council meeting at Denver, Colorado, April 29-30, 1972, the Section voted, 12 to 6, in favor of the recommendations contained in instant report; and further agreed, in the interest of presenting the issues fully for consideration by the House of Delegates, to submit both a majority and minority report, both of which are contained herein.

Majority report in favor of the recommendations submitted by the following:

Chester Bedell
George D. Crowley
Samuel Dash
Albert J. Datz
Jack G. Day
Robert M. Ervin
Roger L. Keithley
Walter F. Rogosheske
Gilbert S. Rosenthal
George Shadoan
Thomas R. Sheridan
Paul E. Wilson

Bluntly put, Senate Bill 2657, introduced by Senator Lloyd Bentsen, of Texas, is a legislative proposal to do away with the exclusionary rule of evidence. Although the bill purports to preserve the exclusionary rule in cases where there is a "substantial" violation of the search and seizure provisions of the Fourth Amendment, the six criteria set forth in the bill for the determination of substantiality will provide any judge with a basis for admitting practically all illegally seized evidence. A substantial majority of the members of the Council believe that such a legislative provision would be in direct violation of the Constitution of the United States as it has been interpreted by the Supreme Court of the United States. In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court held that the exclusionary rule of evidence was an integral part of the Fourth Amendment of the United States Constitution. In the face of such a holding, it is clear that Congress cannot by legislation remove or reduce the application of the exclusionary rule in our system of criminal justice.

It is important to remember that the Supreme Court did not move hastily in imposing the exclusionary rule of evidence as a constitutional requirement for the States. It waited 12 years after its decision of Wolf v. Colorado, 338 U.S. 25 (1949), which held that the search and seizure provisions of the Fourth Amendment were applicable to the States through the Fourteenth Amendment, but declined to impose on the States, at that time, the Federal exclusionary rule enunciated in Weeks v. United States, 232 U.S. 383 (1914). In 1949, the Supreme Court in the Wolf case, supra, wanted to permit the States as "laboratories" to experiment with alternative remedies to the exclusionary rule. During these years when the Supreme Court held back, such alternative "remedies" to the exclusionary rule as internal police discipline procedures, prosecution of police and private tort actions proved utterly worthless. Actually, those States that wished to have an effective remedy against illegal search and seizure practices by the police chose the exclusionary rule. By 1956, 23 States had abandoned other methods of enforcing search and seizure protections in favor of the exclusionary rule in the hope of shaping police conduct to conform to constitutional standards. See Annot. 50 A.L.R. 2d 531, 556 et seq. (1956).

In States which did not provide such a remedy, as the exclusionary rule, constitutional search and seizure protections were nothing more than an empty promise. The Supreme Court became aware of this in Irvine v. California, 347 U.S. 128 (1954), which presented so shocking a case of illegal police practices in the search of a home in Los Angeles that it led Mr. Justice Jackson to exclaim:

"That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that were flagrantly, deliberately, and persistently violating the fundamental principles declared by the Fourth Amendment as a restriction of the federal government that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person and thing to be seized'."

Nevertheless, the court still patiently followed its cautious approach taken in Wolf v. Colorado, supra. However, shortly afterwards, the Supreme Court in California, itself, imposed its own exclusionary rule on the State when it experienced a repetition of the Irvine-type illegal police practices in People v. Cahan, 44 Cal. 2d 434 (1956).

Finally, in 1961, the Supreme Court in Mapp, supra, held that the only way to give real meaning to the protections afforded by the Fourth Amendment was to no longer "consistently tolerate denial of its (Fourth Amendment) most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure." "To hold otherwise," the Court stated, "is to grant the right but in reality to withhold its privilege and enjoyment."

Speaking eloquently for the Court, in Mapp v. Ohio, Mr. Justice Clark upheld imposing the sanction of the exclusionary rule on unlawful police conduct by referring to the following fundamental philosophy:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 1928, 277 U.S. 438, 485, 48 S. Ct. 564, 575: 'Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . if the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'"

Mr. Justice Clark also pointed to the long successful history of the Federal Bureau of Investigation in combating crime despite the existence of the federal exclusionary rule, as proof that it cannot "lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement." It is worth quoting Mr. Justice Clark's stirring closing language of his opinion in Mapp justifying the holding of the court that the exclusionary rule was an integral part of the Fourth Amendment to the United States Constitution. He stated:

"The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having

once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

It is important to recognize that the right to privacy guaranteed by the Fourth Amendment, with the integral support of the exclusionary rule, is not a right provided for criminals. It is a right enjoyed by all people in the United States. It protects the homes and offices of every one of us from illegal police intrusions. This constitutional safeguard is equally aimed at illegal government action in the anti-trust field, the income tax field and the regulation of business and industry.

Now a little over 10 years after Mapp it is claimed that the exclusionary rule has not worked. There is no empirical data to conclusively establish this. Such proof is not found in Professor Oaks article, studying the Exclusionary Rule in Search and Seizure, 37 U. of Chi. L.R. 665 (1970). His article states that the evidence is not conclusive, although, in pages 678 through 709 and especially the summary of findings on pages 706 through 709, sets forth a good deal of statistical data challenging the effectiveness of the exclusionary rule. For example, he cites a study of arrests and convictions for seizures of property in Cincinnati, Ohio, before and after the Mapp decision as showing no significant changes in police behavior. The majority position of the Council is that in actuality there is no way to be certain what precise effect the exclusionary rule has had on police conduct without an extensive examination of at least a representative sample of police actions in connection with particular searches, seizures and arrests. This is so because no notoriety attends legal police conduct, and both incidents and the motivation for it go unrecorded. It is probable that very marked, but unmeasured, improvements in police procedures have taken place. For example, there has not come to the attention of the courts since the Mapp decision, any cases revealing such outlandish police practices as took place in California in the Irvine and Cahan cases, with the exception, perhaps, of the revelation of illegal Federal wiretapping practices in the 1960's.

Indeed, if it is assumed that police intend to be both rational and lawful, and any other assumption is insupportable, then the exclusionary rule must have contributed to more lawful actions by the police, augmented the professionalism of law enforcement officers, and improved the integrity of the judicial process by leeching from it at least some illegally acquired evidence. Furthermore, the overwhelming percentage of pleas and convictions which attend charges provides ample proof that the rule has not stultified either police work or the judicial process. At the same time there is no demonstrated connection between increases in crime rates and the rule. To conclude otherwise requires generalizations about cause and effect in crime rates which are unwarranted without vastly more data and analysis than is now available. For there reasons, it is our considered view that the exclusionary rule, while no panacea, is, of all the available alternatives, most likely to motivate police conduct in a lawful direction.

It is now argued that the amendment to the Bentsen bill, which provides a tort remedy against the government for a victim of an unlawful search and seizure by the police, is a new and alternative remedy to the exclusionary rule. Actually, this is merely the old private law suit remedy trotted out once again. It may be true that one has a greater chance of recovering money from the government than from an individual police officer, but there is no assurance that such suits can be successfully brought, or that judges and juries will be inclined to grant more than normal damages. There is the further question of whether the payment by the government of some damages can serve as a deterrent to individual police officers. Given the likelihood of infrequent law suits and insubstantial damages where suits may be brought, government officials may be willing to pay damages occasionally to gather the fruits of illegal searches and seizures to secure convictions.

We would be in favor of a separate enactment by the Congress of the tort action remedy against the government for a victim of an illegal search and seizure by law enforcement officers, without at the same time removing or reducing the application of the exclusionary rule. Such legislation would permit us to obtain a record of experience concerning whether, in fact, it is an effective alternative remedy to the exclusionary rule. If it proves to be so, then it is time to consider the question of whether the exclusionary rule is still needed. But in the absence of such information, Mr. Justice Clark's reasoning for making the exclusionary rule an integral part of the Fourth Amendment to the Constitution is just as applicable today as it was in 1961.

It is therefore the position of a substantial majority of the members of the Council of the Section of Criminal Law that any modification of the exclusionary rule is a question solely for the decision of the Supreme Court of the United States, and that the American Bar Association should oppose any effort by Congress to legislate constitutional criteria for the admissibility of illegally seized evidence when the Supreme Court, as of now, has permitted no such legislative tinkering with Fourth Amendment protections.

OPERATION OF THE EXCLUSIONARY RULE

WEDNESDAY, JUNE 16, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2237, Rayburn House Office Building, the Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representative Conyers.

Staff present: Thomas W. Hutchison, counsel; Michael E. Ward, assistant counsel; and Raymond Smietanka, associate counsel.

Mr. CONYERS. The subcommittee will come to order.

Our first witness is the attorney general of Maryland, the Honorable Stephen H. Sachs. If he will come forward, we will be very grateful.

Welcome before the subcommittee.

We are going to stand in a short recess pending a recorded vote on the floor.

[Recess.]

Mr. CONYERS. We will continue the hearings on the oversight operation of the exclusionary rule in criminal trials. These hearings are in response to current concern over the rule by which illegally seized evidence may not be introduced at criminal trials. Recommendations for changes raise constitutional questions as well as other concerns regarding the behavior and conduct of the trial. The purpose of these hearings is to explore those proposed changes and the operation of the rule as it presently exists.

Our first witness is the attorney general of Maryland, the Honorable Stephen Sachs, who is knowledgeable about the Federal criminal justice system by virtue of a wide range of experience as clerk of the Court of Appeals for the District of Columbia Circuit and as an assistant U.S. attorney and U.S. attorney for the District of Maryland.

We appreciate your attention to this matter. Your prepared statement as well as those of all the witnesses will be incorporated in the record. You may proceed.

TESTIMONY OF HON. STEPHEN H. SACHS, ATTORNEY GENERAL OF THE STATE OF MARYLAND, ACCOMPANIED BY DEBORAH HANDEL, CHIEF, CRIMINAL DIVISION, ATTORNEY GENERAL'S OFFICE, STATE OF MARYLAND

Mr. SACHS. Thank you very much.

I would like to introduce to the subcommittee Deborah Handel, chief of the criminal division of the attorney general's office in Maryland, who has made substantial contributions to my learning on this subject.

As you indicated, we have submitted a statement. It is similar to the statement I made to the Criminal Law Subcommittee of the Senate Judiciary Committee. I will not burden the subcommittee with reading what it already has. If I may, I would like to summarize the views that it contains.

I believe, Mr. Chairman, that the exclusionary rule does work to the best interests of professional law enforcement and every American citizen.

This is a time, of course, of great concern about crime, and the rule, I am afraid, has become the favorite whipping boy of many anticrime rhetoricians. My purpose is to bear witness to what my own experience and study of some 20 years in the criminal justice system have taught me, and that is that the rule, first of all, is of constitutional origin and, in my judgment, beyond the reach of Congress; that it results in freeing guilty criminals in a relatively small proportion of cases; that it does deter police and prosecutor violation of constitutional rights to privacy; it manifests our refusal to bring people to justice for violation of the law by violating the law ourselves.

As I point out, there are very urgent priorities in this country's crime-fighting agenda and the downgrading of important constitutional rights should not be among those.

I believe that the present administration, which loudly advertises its intention to emasculate the exclusionary rule, has its priorities confused. Instead of talking about proposals that won't curb crime, the administration should get behind efforts that we know will really fight crime. It should support the most vital recommendation of its own task force on violent crime—prison construction and legislation such as H.R. 4481, already passed by the House of Representatives, encouraging and materially assisting State and local crime-fighting efforts.

These solutions require dollars. The administration opposes them. It prefers to experiment with its own brand of law enforcement on the cheap. It is misleading and dangerous.

My statement details my reasons for believing that the exclusionary rule is beyond the reach of Congress and I won't repeat those here.

I would want to point out, Mr. Chairman, that studies, and one of the very few studies, of the extent to which the rule releases criminals, indicate that in only a very, very small percentage of cases does the exclusionary rule as it applies to the Federal system result in the inability to prosecute persons charged with crime.

Even more fundamentally, I would point out to the subcommittee that we should never lose sight of the fact that the exclusionary rule really causes us to examine the legality of a search only after it has occurred, after incriminating evidence has been found. In fact, if police officers had obeyed the Constitution in the first place, prosecution would never have been brought at all.

I want to underscore that while studies with respect to the deterrent effect of the rule have been called into question, and while I

have read every one of them and share that view, while I cannot offer statistical evidence of the extent the rule deters, I can tell you, based, in my case, on a professional lifetime involvement in the rule, that it does deter.

Every time an assistant U.S. attorney requires FBI agents to get more in the way of probable cause, every time a consultation of that sort takes place in police stations throughout the country, the rule has worked. It is working because prosecutors and police officers want to make sure that their search, their effort to acquire evidence, stands up in court.

I can only tell you in my experience, both now in the State system as well as in the Federal system, the rule deters every day; it also deters in a longer range sense, Mr. Chairman; it deters because I regard the application of the Federal exclusionary rule to the States by the Supreme Court a number of years ago as being almost solely responsible for what can only be called an explosion in police training and police education.

Our statement details the extensive training that Federal officers, FBI and otherwise, go through before they become law enforcement officers, and the same is true in States throughout the country, certainly including my own.

Persons involved in police training in Maryland make no bones about the fact that precisely because of the Supreme Court's ruling in *Mapp,* these training exercises and instruction of police officers in the rudiments of at least fourth amendment rights have occurred.

As I point out in the statement, police officers on the beat are supposed to be—as Justice Rehnquist once said—"foot soldiers of society's defense of ordered liberty" and it is well that they know what the basics of liberty and order entail.

We are not trying to make them law professors, but we are attempting, by the deterrent effect of the exclusionary rule, to encourage them to understand the rudiments of the basis of what is required to secure valid and legal evidence.

Much is made, Mr. Chairman—and I am sure the subcommittee has heard it—about the administration's support of the so-called good faith exception to the rule. The argument is made that police officers cannot be deterred if, in fact, in good faith they acquire evidence that they believe to be consistent with the Constitution.

As several commentators have pointed out, the good faith test puts a premium on police ignorance. If the good faith loophole is established, a new layer of pretrial hearings in every fourth amendment case will test the reasonableness of the police officer's ignorance of the fourth amendment's commands.

Often—very often, given the antipathy of some judges toward the rule and public pressure to jettison it—the officer's ignorance will be found to have been reasonable. And each time unconstitutional behavior is thus excused, the benchmarks of fourth amendment compliance will drop another notch.

It is worth asking what impact such an exemption will have on the courses and classroom hours police will devote to the constitutional limitations on their profession if, in fact, it pays to be ignorant.

Introduction of the reasonable good faith test would, I fear, depress fourth amendment compliance to the level of our tolerance for the lowest standards of the least informed officer, and there would be no incentive to do better.

I want to add to that, we should not lose sight of the fact it is not only the police officer and the prosecutor whom we seek to deter by the exclusion of unconstitutionally seized evidence; we are also talking about lower court judges or magistrates. We have here to observe magistrates, warrant-issuing magistrates, who are close to the law enforcement profession. That is not a severe criticism; it is probably natural and instinctive and unavoidable, all the more reason that they, too, should know that their efforts to join the hunt will be reviewed by higher authority, a higher court, which has the power to reverse, to exclude, to, in short, deny the hunter the fruits of the hunt. That is a systemic deterrence that I think the rule has that is often overlooked in focusing on the police officer on the beat.

It is sometimes said, of course, how can police officers be expected to understand the recondite world of the Supreme Court debate with respect to the requirements of the fourth amendment. Let me acknowledge there is some force to that criticism. Every time there is a ruling by the Supreme Court it is not always crystal clear, but I think the argument goes beyond being exaggerated.

First of all, most rules are clear. Most policemen know, and know very well, what they may and may not do in most of the cases that come before them. It is true in some cases that searches of cars have been in the news and the Supreme Court has gone a long way to clarify that. In some cases it has not been easy to know.

We should not confuse the exclusionary rule with the requirement and, I think, the necessity, that judges should be practical in interpreting the substance of the fourth amendment. The fourth amendment is, after all, a rule of reason which ought to be interpreted with a practical view of the kind of judgments that police officers on the street are called upon to make. We should not jettison the rule because some judges have been hypertechnical in their interpretation of the fourth amendment requirements.

Finally, Mr. Chairman, let me simply conclude by saying this: It is sometimes said that the exclusionary rule breeds disrespect for the law because it suppresses the truth and permits crime to go unpunished.

I believe that abolition of the rule would be far more destructive of respect for law. When an American court admits evidence obtained in violation of the Constitution, it is not merely permitting the truth to be heard; it is inescapably condoning, validating, even welcoming, the illegality that produced it. It becomes part of that illegality. It paints a portrait of hypocrisy in a nation that professes to believe in the rule of law.

It is easy to salute the liberties of the Bill of Rights in the abstract. But these freedoms have a price. It is difficult to remember, but we must never forget, that we cannot apply them selectively. Only insofar as we permit their effective exercise by the guilty will they remain strong protections for the innocent. Rights atrophy

with disuse; they must be used not only in times of calm but also in times of passion and fear as well.

Mr. Chairman, that is a summary of what it is I have to say to the committee. I ask that the committee consider my entire statement as submitted.

Mr. CONYERS. Thank you very much for opening the discussion.

I notice the gentleman from Maryland, Mr. Hoyer, is here. Would he care to welcome our witnesses and his colleague?

TESTIMONY OF HON. STENY H. HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. HOYER. Mr. Chairman, I apologize for my lateness. I did want to have the opportunity of joining the attorney general of Maryland this morning. Although I did not hear his testimony today, he has given testimony previously on this question. As you know, he is not only the attorney general of Maryland but he is a former U.S. attorney from our State, and he is perceived as a person who understands the adverse ramifications of crime and the necessity to be tough on those who would commit crimes. At the same time—and I know you have heard this in his statement—General Sachs articulates a very deep understanding from a prosecutor's perspective and that is why his perspective is so important. Our constitutional protections are contingent upon the fact that they apply to everybody, even to those suspected of the commission of a crime or to those on trial for the commission of a crime.

Not having read the specific remarks but knowing full well Mr. Sachs' position and philosophical grounding with respect to this question, I would like to join with him in sharing his concerns. I think all of us who have the privilege of representing Maryland in the Congress of the United States, on both sides of the aisle and in both Houses, have great respect for Mr. Sachs' knowledge and for his commitment to the rule of law in our country.

I am very pleased to welcome him here, as I know you have already done. He is an individual for whom the Maryland delegation has very great respect.

Mr. CONYERS. I thank my colleague from Maryland and note that as an able lawyer, he has served not only in the State government but also as a private attorney. We welcome his comments in introducing the attorney general of the State.

Mr. HOYER. The chairman, as always, is very gracious.

Mr. CONYERS. Might I ask you, Mr. Attorney General, about your comment that if the police followed the Constitution in the first place, the exclusionary rule might not be necessary. Would you elaborate on that?

Mr. SACHS. Yes; I will be glad to.

First, let me thank Congressman Hoyer for his very gracious, although accurate, remarks about me. [Laughter.]

In all seriousness, he has pointed out he is especially sensitive to these concerns and we are proud he is in the Congress of the United States.

What I mean by that comment, Mr. Chairman, is really this: The exclusionary rule suffers from very bad public relations, not only

that it appears to—well, that it suppresses truth, but also that it sometimes results in persons who may well be guilty being freed. Most importantly, it operates after the fact. The world can see that there is evidence that may be good evidence, and if, in fact, the police had done what the laws and Constitution of this country require in the first place, they would not have seized the evidence.

One way to put it, if we took a swat team and put it at this very moment on the corner of someplace in downtown Washington, D.C., or Baltimore, Md., or Detroit, Mich., I am sure if they simply stopped the first 500 men and women whom they encountered and they searched them, I would be surprised if they might not uncover substantial evidence or leads to evidence about criminality.

Thus, the arguments of opponents of the rule sometimes prove too much. The reason we don't do that is because it would be an outrageous offense to the rule of law.

Unless we have a rule, in my judgment, that excludes such evidence, we will be permitting such incursion into the constitutional protective process. That is what is meant by if the Constitution had been obeyed it would not have been necessary to exclude evidence in the first place.

Mr. CONYERS. It has been argued in the course of the hearings that abolishing the exclusionary rule will not have any impact on crime.

Mr. SACHS. I think that abolishing the exclusionary rule would have only an infinitesimal effect on the conviction rate. I say that because the GAO study referred to in my statement and Mr. Eisenberg's and some others who will come before you, makes the point, after surveying 38 U.S. attorney offices throughout the country, that the exclusions have only a minimal effect on defendants who are cut loose.

In State courts, although there are no measurements in State courts, the percentage might be somewhat higher; not in silent crime cases but in drug seizure cases, it may be somewhat higher, I must concede that, but it is almost imperceptible compared to the damage that would be done.

If what is meant, however, is that by not having the rule, police would then feel free to go anywhere and do anything, then I think I would have to concede that more criminals could be caught; but at what price, is the question, at what awful price?

I don't know very many Americans who would lightly throw away the protection if faced with that kind of situation.

Mr. CONYERS. In terms of efficiency, could it be argued that the exclusionary rule is the least expensive way of enforcing the rights protected by the fourth amendment?

Mr. SACHS. If you mean in terms of dollars and cents, it is not without some cost. There are hearings; there is court time. The courts are already overtaxed with a whole new layer of litigation to explore what is reasonable and what is not. So, I think we presently would have less cost than the alternative being suggested.

There are other remedies, of course. Police boards and police discipline are remedies. I don't want to exclude or denigrate them. Many of them are worth trying but, in my judgment, not as a substitute for but perhaps as an adjunct to the rule.

In the past, in my judgment and in the judgment of most observers I know, they have not worked. It is not in the nature of police disciplinary boards to discipline except for the most outrageous misconduct. It is not in the nature of juries to punish police officers who are seen as doing their duty, overzealous perhaps, but nevertheless trying to protect us. It is not in the nature of juries to punish conduct except in the most outrageous cases.

Most of these constitutional protections are rules of the road, mundane; they involve stopping on the street; they do not happen usually to beings in the most outrageous conduct that shocks the conscience. We are not talking about conduct that shocks the conscience but conduct that intrudes into the constitutional rights of innocent American citizens that the rule protects.

Mr. CONYERS. I am beginning to wonder whether or not we should also examine that part of the law that provides remedies for illegal searches and seizures. I am wondering if we should concentrate on the Government's liability for flagrant violations of the fourth amendment.

Mr. SACHS. I agree with that observation, Mr. Chairman. I think that needs to be studied and to the extent I have already looked at it, I would agree that more remedies ought to be available. We are talking, of course, in those cases about innocent victims, people who have not committed any crime but who may have been injured, sometimes seriously, sometimes not, by police officials' misconduct. It would seem to me outrageous that there should be no compensation for such people.

The issue always becomes whether the individual police officer or the Government itself ought to be responsible. It seems to me that there is much public policy to suggest that the Government ought to bear the responsibility. That is a subject for another discussion, but I share your observation.

Mr. CONYERS. Have you thought about police management and administration? I ask you and my colleague, who may have had more experience at the State level, are we developing methods to manage more efficiently these myriad responsibilities of law enforcement officers? For as more and more of our tax revenues are going toward law enforcement, it seems to me that sooner or later we are going to have to look at the whole question of management and efficiency.

There are many questions to explore. For example, we must ask: Are the police truly fit for duty? How and where are they assigned to work and why? What kind of training are the officers receiving?

Those kinds of questions require careful examination. I wonder what your experience has been along that line.

Mr. SACHS. I agree entirely, Mr. Chairman, that they are questions that are far from having been resolved. I can share with you an impression and that is all it is: My impression is that in recent years, and by that I mean the last dozen years, in my State and in the Federal Government and, I suspect, without knowing for sure, many other States, there has been an increased attention to the management of police resources and increasing attention to the need for efficient management review of police, not only in training in the areas that I have been talking about—the establishment in Maryland only 15 years ago of a police training commission to

do something which I think the exclusionary rule helped to bring about—but in terms of employment, in terms of skills, in terms of operation and management.

I notice the Baltimore City Police Department and the State police of Maryland—I think I can tell you as an FBI watcher of some standing—I say "watcher," not necessarily always in agreement—I think I have seen some change, substantial change, in the use of management techniques.

The Police Foundation, an organization I suspect the chairman is familiar with, is one that has begun to look at how to professionalize police officers. I am sure we have a long way to go, Mr. Chairman, but your message is one that I think is widely shared throughout the law enforcement community.

I would like to drop this footnote so that I am not misunderstood: I say that not only as a politician, which, of course, I am, but also most police officers don't violate anybody's rights. Most police commanders don't want to break the law. The great majority feel that way. Sometimes they are legitimately concerned about not having guidelines that are sufficiently clear and that is an understandable concern. Many of the law enforcement officials share this concern. Many judges share this concern.

What I am really saying is that when I talk about the need for deterrence it is not that we must punish policemen, although we should when they are bad, but it is simply unreasonable in a nation ruled by law to believe that the hunter can be relied upon to establish and obey the rules of the chase. It just does not work that way. It is not human nature. That is the reason we have magistrates used in the generic sense, who are supposed to make those kinds of judgments. I think that is the function of the exclusionary rule. It is really a question of having umpires in a very important and profound public exercise, namely, the business of ferreting out and punishing crime.

Mr. CONYERS. Congressman Hoyer, do you have any comments?

Mr. HOYER. As resources become more dear, their allocation to any agency becomes more important in terms of how effectively that resource is being used. I think we can draw a Federal analogy to the Defense Department, which is somewhat in the position of public safety agencies in our local jurisdictions, in that there clearly is a wide consensus that the objectives they carry out are absolutely essential and must be done effectively.

At the national level we must be able to defend ourselves and at the local level we must be able to defend ourselves against crime.

In my own county, Prince Georges County, adjacent to the District of Columbia, our county executive has indicated that his principal priority, according to the budget process, is public safety.

We are in the process of laying off some 500-plus teachers as a result of the recognition of that priority. It is unfortunate, from my perspective, that we need to prioritize between two absolutely essential functions of government—education of our next generation and the safety of our public. Nevertheless, when this happens it is clear that we have to make sure that moneys spent in this area are spent very effectively.

I agree 100 percent with the attorney general's comment as it relates to the specific subject of this hearing. Police officers both in

the field and in management want to perform correctly so that they don't have to go through the very time-consuming process of preparing for hearings relating to the introduction of evidence, introduction of statements, whatever it might be, because that is an uneconomic use of their time. If they do it properly in the first instance, they will not have to waste time, pecking away at the typewriter to prepare a very lengthy response for the State's attorney and prosecuting officer or what have you.

I think it is essential that we have good training programs so that police effectively carry out their duties in the first instance, precluding many of the situations, which, from a public relations standpoint do cause the exclusionary rule problem. However, the three of us would think it is absolutely essential if we are to create the kind of society we want to have.

Mr. CONYERS. Counsel Michael Ward.

Mr. WARD. I have a question based on your position as a State official: Supposing Congress were to pass legislation on the exclusionary rule and the Supreme Court did uphold the legislation in stating that the exclusionary rule is not constitutional, what impact would you see that having on the use of the exclusionary rule?

Mr. SACHS. I am sure it would cause confusion. The overall effect would be to spawn in the States—and there is a tendency already in some States—Arizona and Colorado already have legislation; California has already adopted rules undercutting the exclusionary rule—if the Congress of the United States were to do that for the Federal system and it were upheld by the Supreme Court, I think you would have something approaching the tidal wave of effort in the State legislatures to accomplish the same result.

Inevitably, I think you would begin to have a disparity of rules.

I think one of the benefits of what has been called the criminal law revolution by the Warren court, but continued without question through recent years, one of the beneficial things, I think, has been a greater standardization of the rules of constitutional adjudication in criminal cases. I think it has been beneficial. I think it has been beneficial not because everything has to happen the same way in every State, but I think beneficial because I think the fundamental rule of fairness ought not to vary depending on the State line.

I think by and large the federalization of criminal law has been beneficial to the States, not simply to some abstract notion.

Mr. WARD. The other question I have may be somewhat unfair, in that we did not ask you to address specific legislation, but H.R. 4422 is different from the other bills; it prohibits the State from applying the exclusionary rule in State proceedings, and establishes a Federal cause of action with original jurisdiction in State courts against State officers that violate the fourth amendment.

Do you have any initial reaction as to the constitutionality of such legislation?

Mr. SACHS. Whose bill?

Mr. WARD. Ms. Evans' bill. This is a bill that would prohibit States applying the exclusionary rule, and would create a Federal cause of action against officers who violate the fourth amendment with original jurisdiction in the State court.

Mr. SACHS. I can't give you an off-the-top-of-my-head reaction to its constitutionality; it raises some interesting questions as to the reach. It may be that the Congress can implement the fourth amendment in a way that speaks to the State's interpretation. That is possible, but I am not sure one way or the other. I am not sure that it could constitutionally speak to the State's application of its own constitution. Every State has its own fourth amendment. I would imagine this bill purports to speak to that and to that extent might be a bit of a nullity. I don't know.

It strikes me as more exotic than I am accustomed to.

Mr. WARD. Thank you, Mr. Sachs.

Mr. CONYERS. Could I ask the assistant to the attorney general whether she would have any comments she would like to make before we close this questioning?

Ms. HANDEL. Thank you very much. I think the attorney general covered it very well.

Mr. CONYERS. I thank you all for joining us.

Ms. HANDEL. Thank you, Mr. Chairman.

[The complete statement of Attorney General Sachs follows:]

STATEMENT OF STEPHEN H. SACHS, ATTORNEY GENERAL OF MARYLAND

I

My name is Stephen H. Sachs. I am Attorney General of Maryland. I am grateful to the the members of the House Judiciary Subcommittee on Criminal Justice for the opportunity to share my views on the exclusionary rule's impact on the administration of criminal justice. I urge the Subcommittee to be extremely skeptical of the many proposals, now very much in vogue, to modify a rule which has barred unconstitutionally seized evidence from federal criminal trials for almost 70 years. I make that recommendation because after 20 years' experience with the rule, half of it as a prosecutor, I continue to believe that the rule works in the best interests of professional law enforcement and every American citizen.

I would like to say a preliminary word about my professional background and some of my views on the operation of the criminal justice system generally. I am a 1960 graduate of the Yale Law School. I clerked on the United States Court of Appeals for the District of Columbia Circuit. I served as an Assistant United States Attorney for Maryland from 1961 to 1964 and as the United States Attorney for Maryland from 1967 to 1970. I was elected Attorney General in 1978. I spent the intervening years in private practice in Baltimore, much of it centering on criminal justice topics and have taught law school courses in criminal procedure and trial practices.

My years as a federal and state prosecutor have involved me personally and directly—as trial and appellate lawyer, investigating attorney or active supervisor—in the detection and prosecution of crime ranging from murder, rape and narcotics offenses to tax evasion, fraud and bribery. Like most law enforcement officials, I share our citizens' alarm and anger at the dreadful impact of crime in our society and want to strengthen law enforcement's capabilities. I agree with many of the recommendations made to Attorney General Smith by his Task Force On Violent Crime, including those recommendations which would facilitate pretrial detention of some demonstrably dangerous criminals and curb collateral review of state convictions by federal courts. And I deplore the hypertechnical excess with which some courts have interpreted the substance of the Fourth Amendment's guarantees against unreasonable searches and seizures. In short, I don't think that I qualify for membership in what a key presidential advisor recently called, I hope in an overwrought moment, "the criminals' lobby".

What I also believe, however, is that the exclusionary rule, the remedy for a Fourth Amendment violation which suppresses its fruits and denies government the benefit of its unconstitutional conduct, is sound in theory and effective in practice.

The rule is also very fragile, especially in today's atmosphere of understandable public outrage at crime and at our perceived inability to do much about it. It is vulnerable to attack because its values are abstract while its price is tangible. It frequently excludes hard evidence, the truth, from trial. It appears to reward the unde-

serving criminal, whom it sometimes frees because "the constable blundered". It seems to give aid and comfort only to the enemy in the war on crime. It makes almost no sense to citizens fed up with crime and impatient with legal "technicalities" who want to believe that crime would disappear if only courts would stop coddling criminals. That is why the rule, although it has plenty of responsible critics, has become a favorite whipping boy of anticrime rhetoricians.

My purpose today is simply to bear witness to what my own experience and study have taught me: (1) The rule is of constitutional origin and beyond the reach of Congress; (2) it results in freeing guilty criminals in a relatively small proportion of cases; (3) it definitely deters police and prosecutor violations of constitutional rights to privacy; and (4) it manifests our refusal to stoop to conquer, to convict lawbreakers by relying on official lawlessness, a vital demonstration of our commitment to the rule of law.

There should be many urgent priorities in this country's crime fighting agenda, among them the overhaul of a dilapidated corrections system, creation of victim compensation and offender restitution programs, upgrading of the status and compensation of law enforcement officers and reduction of the length and breadth of the criminal appeal process. I respectfully suggest that attempts to downgrade important constitutional rights should not be among them.

I believe that the present Administration, which loudly advertises its intention to emasculate the exclusionary rule, has its priorities confused. Instead of talking tough about proposals that won't curb crime, but will weaken the constitutional protections available to all Americans, the Administration should get behind efforts that we know really will fight crime. It should support, for example, the most vital recommendation of its own Task Force on Violent Crime—helping the States fund urgently needed prison construction—and legislation such as H.R. 4481, already passed by the House of Representatives, encouraging and materially assisting State and local crime fighting efforts. These solutions require dollars. The Administration opposes them. It prefers to experiment instead with its own brand of law enforcement on-the-cheap. Such corner cutting is not only cheap. It is misleading. And it is dangerous.

II

I believe that the exclusionary rule is a rule of constitutional origin which only the Supreme Court, as part of its process of constitutional adjudication, can alter. Others more scholarly than I will undoubtedly appear before the Subcommittee to address this issue, but I would like to outline my analysis.

The rule was first announced in *Weeks* v. *United States,* 232 U.S. 383 (1914), where Justice Day focused on the constitutional necessity of effectively enforcing the Fourth Amendment:

"The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, ... This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, *should find no sanction in the judgments of the courts,* which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U.S. at 391–92 (emphasis added).

The Supreme Court emphatically established the exclusionary rule's constitutional roots when it made the rule applicable to the states in *Mapp* v. *Ohio,* 367 U.S. 643 (1961):

"We hold that all evidence obtained by searches and seizures in violation of the Constitution is, *by that same authority,* inadmissible in a state court."

"Moreover, our holding that *the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments* is not only the logical dictate of prior cases, but it also makes very good sense." 367 U.S. at 655, 657, (emphasis added).[1]

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[1] As pointed out by Justice Powell in *Stone* v. *Powell,* 428 U.S. 465, 484 n.21 (1976), the majority in Mapp did not agree on the precise constitutional peg for the exclusionary rule: "Only four Justices adopted the view that the Fourth Amendment itself requires the exclusion of unconsti-

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Even Chief Justice Burger, no friend of the exclusionary principle, acknowledges that the rule is of constitutional dimension. He has suggested that Congress could create a remedy for unlawful police conduct which, if it works, might be found by the Court to be a satisfactory substitute for the judicial rule. But he has carefully noted that such an alternative would only be relevant to a judicial determination by the Court that it was an effective deterrent to Fourth Amendment violations. *Bivens* v. *Six Unknown Agents,* 403 U.S. 388, 415 (1971) (dissenting opinion).

While the Court has occasionally limited the reach of the rule, it has not retreated from its constitutional base. The rule may be a "judicially created remedy", *U.S.* v. *Calandra,* 414 U.S. 338, 348 (1974), but it has clear constitutional under-pinnings.

III

The most severe indictment of the rule and, in the present climate of fear about crime, the most damaging one is that it releases hordes of dangerous and demonstrably guilty criminals to prey upon society.[2]

I believe that such claims are greatly exaggerated. In cases where unconstitutionally seized evidence is indispensible to conviction, convictions are obviously lost. Police and prosecutors will be frustrated. In the occasional celebrated case, the public will be angry. But a recent study done by the Comptroller General of the United States proves that the rule operates to free federal criminal suspects in only a tiny percentage of cases.[3] The Comptroller General studied the rule's operation in 2,804 cases in 38 representative United States Attorneys Offices throughout the country during the period July 1 through August 31, 1978. Of all the cases presented to those federal prosecutors for prosecution, only 0.4 percent were declined by the prosecutors because of Fourth Amendment search and seizure problems. Evidence was excluded at trial as a result of Fourth Amendment motions in only 1.3 percent of the cases. And over 50 percent of the few defendants whose suppression motions were granted in whole or in part were nonetheless convicted. This data is powerful proof that at least in federal prosecutions the spectre of muggers, rapists and dope pushers set loose by the rule is the product of rhetoric that is not in touch with reality.

To my knowledge, no comparable study of state and local experience has been conducted. Based on my personal observation and my contacts with other Maryland prosecutors, however, I would expect the impact of the rule on state prosecutions to be somewhat greater, but still fall far short of justifying the claims of the alarmists. I believe a fair summary of the Maryland experience to be that the rule has small effect on declinations by prosecutors, or loss at trial, in almost all categories of crime, including violent crime, except for a significantly higher incidence of suppression motions granted in drug possession cases resulting from spontaneous street encounters. As Professor LaFave has written in his treatise on search and seizure: "[T]here is reason to believe that the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed."[4]

There is an even more fundamental response to the claim that the exclusionary rule frees criminals. As pointed out by Professor Kamisar, we tend to examine the legality of a search only after it has occurred—and after incriminating evidence has been discovered—and therefore lose sight of the fact that if the police had obeyed the Fourth Amendment they would not have the evidence at all. Thus, it is the guarantee of the Fourth Amendment, a cornerstone of our personal liberty, which constricts the police. The rule only serves to put the police in the same position they would have been in had they done in the first place what the Constitution commanded. As Kamisar asks: "If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it has violated the Constitution?"[5]

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tutionally seized evidence in state criminal trials. . . . Mr. Justice Black adhered to his view that the Fourth Amendment, standing alone, was not sufficient . . . but concluded that, when the Fourth Amendment is considered in conjunction with the Fifth Amendment ban against compelled self-incrimination, a constitutional basis emerges for requiring exclusion." (citations omitted).

[2] See, e.g., Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 215 (1978).

[3] Impact of the Exclusionary Rule on Federal Criminal Prosecutions (Report of the Comptroller General, April 19, 1979).

[4] W. LaFave, "Search and Seizure" § 1.2 n.9 (1981 Supplement).

[5] Y. Kamisar, "A Defense of the Exclusionary Rule," 15 Crim. L. Bull. 5, 13 (1979).

IV

A fundamental assumption underlying creation of the rule was the judicial belief that it deters official lawlessness and "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217 (1960). Critics charge that the rule fails in this primary purpose and point to various empirical studies which, they argue, demonstrate that the rule is ineffective as a deterrent. The studies have been thoroughly dissected elsewhere. I have read most of them and agree with Justice Powell's conclusion that they are "inconclusive".[6]

I can't offer statistical studies on the deterrent effect of the rule. What I can offer, however, is my testimony that I have watched the rule deter, routinely, throughout my years as a prosecutor. When an Assistant United States Attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better "make" on the car; or that he has a "staleness" problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girl friend's apartment; or that he should apply for a search warrant from a magistrate and not rely on the "consent" of the suspect's kid sister to search his home—the rule is working. The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court.

Episodes like these are commonplace. It was part of the routine of every federal prosecutor with whom I worked. Although my present office has more limited criminal jurisdiction, such police-prosecutor consultation is customary in all of our cases when Fourth Amendment concerns arise. I strongly suspect that scenes like these are repeated daily throughout federal law enforcement and on homicide, narcotics and gambling squads in cities throughout the country. In at least 3 Maryland jurisdictions, for example, prosecutors are on 24-hour call to field search and seizure questions presented by police officers.

These contacts do not occur because of some self-limiting controls in the police and prosecutors themselves. I hope and trust that most of us in law enforcement are principled enough to avoid violating the clear constitutional rights of suspects. But in the heat of the chase, and in the absence of effective sanction, I believe that we would define those rights, to put it mildly, somewhat narrowly. Questions of adequate identification, "staleness" of information and the need for a warrant will be answered differently by unchecked law enforcers than by judges. We are, after all, hunters stalking crime. It is simply too much to ask for objectivity in the midst of the hunt, especially when the quarry is in sight. This is precisely what the warrant requirement of the Fourth Amendment is about. As Justice Jackson once put it:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 13–14 (1948).

Exclusion from evidence is almost certainly the only effective deterrent in the vast majority of unconstitutional intrusions. Even critics of the rule are quick to acknowledge the severe limitations of police self-discipline or court damage actions as deterrents when crime fighting police officers are in the dock.[7] In rare cases involving especially gross misconduct, a police disciplinary board or a court or jury in a damage action might, might, impose sanctions, at least if the victim of the trespass is innocent and the police misconduct truly outrageous.

But most of the suppression cases do not deal with such outrageous conduct. They deal with undramatic Fourth Amendment concerns—the sufficiency of "probable cause" in a given case, whether "exigent circumstances" excuse the necessity of a warrant, whether there is sufficient corroboration of the tip of an anonymous informer to justify intrusion into a suspect's apartment. These requirements are not

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[6] *Stone* v. *Powell,* supra, 428 U.S. at 492 n. 32; *United States* v. *Janis,* 428 U.S. 433, 449–53 (1976) ("[E]ach empirical study on the subject, in its own way, appears to be flawed.") See also, Canon, "The Exclusionary Rule: Have Critics Proven That it Doesn't Deter Police," 62 Judicature 398 (1979); Schlesinger, "The Exclusionary Rule: Have Proponents Proven That it is a Deterrent to Police?," 62 Judicature 404 (1979); S. Schlesinger, "Exclusionary Injustice" (1977); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1969–70); Kamisar, "A Defense of the Exclusionary Rule," 15 Crim. L. Bull. 5, 35–39 (1979); Wilkey, "A Call for Alternatives to the Exclusionary Rule," 62 Judicature 351 (1979).

[7] *Bivens,* supra, 403 U.S. at 421–22 (Burger, C. J., dissenting); S. Schlesinger, "Exclusionary Injustice" 77ff.

the stuff to move police disciplinary boards, or judges and juries accustomed to awarding damages on the basis of "fault". But they are our constitutional rules of the road and only the suppression sanction, the exclusionary rule, will force prosecutors and police to obey them.

There are many who would object to these requirements as unnecessary impediments in the path of aggressive law enforcement. I disagree. These requirements are the way we attempt to reach a balance between the claims of public safety and the claims of personal freedom in a nation that believes that government, including police, should not have limitless power. And only by demonstrating that our courts will not permit their violation can we underscore their importance or enforce them at all.

My views about the deterrence inherent in the close police-prosecution contacts with which I am most familiar are subject to the criticism that they do not describe the rule's impact on the uniformed officer on patrol or the agent on the street who is called upon to make split-second arrest and search decisions and who measures his success by arrests made, not convictions won.

There is force to this criticism. I don't doubt that the rule works less well in street encounters. But here, too, the rule is at work because of the enormous increase in police training and education about constitutional rights directly attributable to the exclusion sanction.

Federal agencies, subjected to the exclusionary rule since 1914, have traditionally devoted substantial time to such training. For example, in the 15-week FBI training program at its Training Academy in Quantico, Virginia, approximately 67 hours are devoted to legal instruction, the majority of which deal with constitutional law. In addition, agents spend another 30 hours in practical application of these constitutional law principles (e.g., practice arrests, searches, interrogations, applications for search warrants). Each FBI field office has a legal advisor to keep field agents abreast of current changes in the law.

All other new federal law enforcement agents undergo a consolidated law enforcement criminal investigation training session at Glencoe, Georgia for eight-weeks, devoting 70 hours to constitutional law and a minimum of 21 hours to search and seizure law. Following the initial training program agents in various federal agencies receive additional training in their own service, some of which involves additional, relevant search and seizure course work.

Customs Department agents continue training for approximately five more weeks, spending 10 to 12 hours on additional search and seizure problems with particular emphasis on those problems relating to customs agents, e.g., border searches. The Drug Enforcement Administration emphasizes search and seizure law in an additional 24 hours and focuses on its particular need, airport searches. The Secret Service provides 16 hours of additional constitutional law training. Refresher courses, in-service training, manuals with up-to-date information are all commonplace today.

In my state, Mapp has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years. A former executive director of the 15-year-old Maryland Police Training Commission attributes the increase in quality and quantity of training and education directly to the need to adjust to the exclusionary rule. Mapp, as he put it, has had "very positive effects." Some of the more striking improvements include: much longer training periods for new officers, especially courses about constitutional rights; many local jurisdictions have more than doubled the training time and now provide over 20 weeks of initial instruction; in-service training, virtually nonexistent before, is now emphasized; higher calibre of instruction, with some courses taught by law-trained college professors; training geared to practical situations such as stop and frisk exercises; and testing constitutional law knowledge on promotional exams.

If police officers on the beat are, in Justice Rehnquist's words, "the foot soldiers of society's defense of ordered liberty",[8] it is well that they know the basics of what "ordered liberty" entails. These courses will not convert police officers into law professors. Thank heavens! But they almost certainly have acquainted a vast army of them with the elements of the right of privacy. The result, I am positive, is that today's police officer is more likely than ever to do an effective job of securing valid, legal evidence without violating the law and the rights of American citizens. The rule does, indeed, "encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone* v. *Powell,* supra. 428 U.S. at 492.

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[8] *Roberts* v. *Louisiana,* 431 U.S. 633, 647 (1977) (Rehnquist, J., dissenting).

V

"GOOD FAITH"

Critics of the rule frequently complain that courts exclude illegally seized evidence even though the officers believed in good faith that their conduct was lawful. As the final report of the Attorney General's Task Force On Violent Crime puts it:

"[A]n officer may in good faith rely on a duly authorized search or arrest warrant or on a statute that is later found to be unconstitutional; or an officer may make a reasonable interpretation of a statute which a court later determines to be inconsistent with the legislative intent; or an officer may reasonably and in good faith conclude that a particular set of facts and circumstances gives rise to probable cause, but a court later concludes otherwise. In such circumstances we do not comprehend how the deterrent purpose of the exclusionary rule is served by exclusion of the evidence seized." [9]

The Task Force proposes that "in general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution." S. 101 reflects this point of view, although it seems to admit illegally seized evidence that even the "reasonable, good faith" rule would bar.

As several commentators have pointed out, the "good faith" test puts a premium on "police ignorance".[10] If the "good faith" loophole is established, a new layer of pretrial hearings in every Fourth Amendment case will test the "reasonableness" of the police officer's ignorance of the Fourth Amendment's commands. Often (very often, given the antipathy of some judges toward the rule and public pressure to jettison it) the officer's ignorance will be found to have been "reasonable". And each time unconstitutional behavior is thus excused, the bench marks of Fourth Amendment compliance will drop another notch. It is worth asking what impact such an exemption will have on the courses and classroom hours police will devote to the constitutional limitations on their profession if, in fact, it pays to be ignorant. Introduction of the "reasonable good faith" test would, I fear, depress Fourth Amendment compliance to the level of our tolerance for the lowest standards of the least informed officer. And there would be no incentive to do better.

Some proposals go beyond the good faith test and would admit evidence "obtained in violation of the Fourth Amendment to the Constitution" unless a federal district court finds such violation to have been either "intentional" or "substantial". In determining "substantiality" a court is invited to consider whether the violation was "reckless", the extent to which privacy was invaded, the deterrent impact of exclusion on similar violations and whether the item seized would have been discovered anyway, all considerations which suggest admission of the evidence even in the absence of reasonable good faith. Under that formulation only the grossest of police misconduct would result in exclusion of evidence.

Advocates of the "good faith"—"substantiality" modification of the rule argue that police officers should not be penalized because they cannot predict what appellate judges, months or years later, will say the police should have done at the time of the search. This argument seriously confuses interpretation of the substantive requirements of the Fourth Amendment with the propriety of the exclusionary remedy when a violation is found. Judges are sometimes wrong and hypertechnical in their interpretation of the Fourth Amendment. They sometimes forget that the Fourth Amendment proscribes only "unreasonable" searches and seizures.[11] Probable cause is supposed to turn on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act", *Brinegar* v. *United States,* 338 U.S. 160, 175 (1949). Scores of Supreme Court pronouncements make it clear that practical, common sense standards, including appreciation of the alternatives available to officers at the scene of crimes, are the guideposts for interpreting the Fourth Amendment's standard of reasonableness.

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[9] U.S. Department of Justice, "Attorney General's Task Force on Violent Crime" (Final Report, August 17, 1981) 55.

[10] Kamisar, "A Defense of the Exclusionary Rule," 15 Crim. L. Bull. at 35 n.15; *United States* v. *Williams,* 622 F.2d 830, 850 n.4 (5th Cir. 1980) (Rubin, J., concurring specially).

[11] See, e.g., *Collonade* v. *Bannister,* 607 P.2d 987 (Colo.), rev'd per curiam, — U.S. —, 101 S.Ct. 42 (1980) (policeman who lawfully stops a car and seizes equipment and occupants must get a warrant to search the car); *People* v. *Krivda,* 96 Cal. Rptr. 62, 486 P.2d 1262 (Cal. 1971) (householder has a "reasonable expectation of privacy" in the contents of trash bags put out for pickup by the trash collector.); *State* v. *Ramos,* 378 So.2d 1294 (Fla. App. 1980) (reversing lower court suppression ruling that a police officer cannot "stop and frisk" a suspect who was wearing long and heavy clothing on a hot June day in Florida with a bulge that looked like a firearm.)

When courts fail to apply these standards of reasonableness, application of the exclusionary rule works to keep out evidence that should have been admitted. But once a violation of the constitutional commands of the Fourth Amendment is found, it would do serious violence to the deterrent purposes and societal values of the rule to say that police conduct is unconstitutional but "we'll let it in anyway". The cure for such wrong interpretations of the Fourth Amendment is better, sounder and more practical judges. One does not have to agree with every court that ever found a search unconstitutional under the Fourth Amendment in order to believe, as I do, that the exclusionary rule is a sound remedy.

ABOLITION

Other proposals which abolish the exclusionary rule and replace it with an exclusive tort remedy against the United States for damages resulting from a search conducted in violation of the Fourth Amendment, are an open invitation to official lawlessness. If that were law, a federal officer could violate the Constitution essentially risk-free. If he engages in an unconstitutional search, even of an innocent suspect and no matter how egregious, he risks no personal liability and no personal expense. Extreme proposals preclude other damage actions by victims of unlawful federal searches and allow the employing agency to subject the officer to "appropriate discipline" if his agency finds that he did not act in good faith.

These proposals, by setting a monetary ceiling on actual and punitive damages, may even prompt agencies to encourage constitutional short-cuts by their employees. An agency that now may be required to spend time and money to put together a lawful case, including probable cause to search for incriminating evidence, might well seek to economize by accepting the fixed risk of a set fine assuming suit is even brought. The agency might well conclude that the cost of doing business would be cheap at twice the price. These are important constitutional protections demeaned; and budget cutting brought to unaccustomed lengths.

Supplementing the deterrent effect of the exclusionary rule in federal court by a tort remedy against the United States makes sense. It would open an avenue of compensation for innocent victims of government misconduct not afforded by the suppression remedy. But to abolish the exclusionary rule and to replace it with a system that would fund unconstitutional conduct is to stand the Fourth Amendment on its head.

VI

It is sometimes said that the exclusionary rule breeds disrespect for the law because it suppresses the truth and permits crime to go unpunished.

I believe that abolition of the rule would be far more destructive of respect for law. When an American court admits evidence obtained in violation of the Constitution it is not merely permitting the truth to be heard. It is inescapably condoning, validating, even welcoming, the illegality that produced it. It becomes part of that illegality. It paints a portrait of hypocrisy in a nation that professes to believe in the rule of law and whose courts, in the words of Madison, are to be the great "bulwarks" and "guardians" of our liberties.[12] And it is dangerous. As Justice Brandeis put it:

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion).

Law enforcement, uniquely, needs public trust and respect for its authority in order to do its job effectively and safely. Official lawlessness destroys that trust, poisons police relations with the citizens they serve and thus adds immeasurably to law enforcement's burdens.[13]

It is easy to salute the liberties of the Bill of Rights in the abstract. But these freedoms have a price. It is difficult to remember, but we must never forget, that we cannot apply them selectively. Only insofar as we permit their effective exercise by

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[12] I Annals of Cong. 439 (1789).

[13] *Lankford* v. *Gelston,* 364 F.2d 197, 204 (4th Cir. 1966).

the guilty will they remain strong protections for the innocent. Rights atrophy with disuse. They must be used not only in times of calm but in times of passion and fear as well.

In the play "A Man for All Seasons", an account of the martyrdom of Saint Thomas More, More warns a zealot against "cut[ting] a great road through the law to get after the Devil".

"When the last law was down, and the Devil turned round on you, where would you hide," he asks, "the laws all being flat?". "Yes," More adds, "I'd give the Devil benefit of law, for my own safety's sake." [14]

In this time of great passion about crime we should be extremely careful, for our own safety's sake, not to let our zeal to "get after the Devil" lead us to cut a great road through the Bill of Rights.

Mr. CONYERS. Howard Eisenberg, executive director of the National Legal Aid and Defender Association, former State public defender in Wisconsin, whose experience has brought him to the Judiciary Committee on a number of occasions—we are pleased to welcome you again, sir.

We have your statement for the record. You may proceed in your own way.

TESTIMONY OF HOWARD EISENBERG, EXECUTIVE DIRECTOR, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, WASHINGTON, D.C.

Mr. EISENBERG. Thank you, Mr. Chairman. I appreciate the fact that my statement will be made a part of the record. I will paraphrase what I have written and perhaps add some additional thoughts.

The National Legal Aid and Defender Association is one of the oldest organizations in the United States concerned about the legal rights of poor people. We were founded in 1911 by members of the private bar who were concerned about availability of legal services to poor people. Since that time, our organization has expanded to become an umbrella organization representing not only private lawyers but also legal aid and legal services lawyers, public defenders, as well as persons in the community served by those types of lawyers. We remain the only national organization devoted to advocating and assuring high quality legal services to poor people in both civil and criminal cases.

As the Chair has noted, I am a criminal defense lawyer by training and experience, having served as a State public defender in the State of Wisconsin from 1972 until 1978. This was very diverse experience. We had statewide jurisdiction from the city of Milwaukee to the Indian territory in the northern part of the State, and many rural and small communities in between.

Since coming to Washington in 1978, first as director of the defender division and recently as executive director of the association, I have had the opportunity to travel as extensively as anyone in the United States, visiting legal services and public defender offices.

It is apparent to me that the exclusionary rule is to a very major degree a poor person's issue. It is obvious from my experience and that of defense lawyers all over the country that a large majority

[14] Robert Bolt, "A Man For All Seasons" Act I, scene 6.

of criminal defendants are poor and require publicly compensated counsel.

It is also my experience that a large percentage of the victims of those defendants are poor people coming from that same community.

In my discussions with members of the client community, both as public defender in Wisconsin and as a member of the staff of the National Legal Aid and Defender Association, it is apparent to me that poor people have a significant stake in what happens to the fourth amendment, both on the Federal level and certainly on a State level.

This committee as well as its counterpart in the Senate has been blessed with a number of erudite and learned treatises on the fourth amendment. I will not go into the historical antecedents for where we are today, except to share with you my perception of why retain and preserve the exclusionary rule.

I should say at the outset that I practiced in a jurisdiction, Wisconsin, in which *Mapp* had no affect whatsoever, the reason being that Wisconsin, long before *Mapp,* had adopted a State exclusionary rule with no dire consequences.

It is my judgment that the wise justices of the Wisconsin Supreme Court would maintain a State exclusionary rule regardless of whatever action Congress might take; yet that inherent right to be free from unreasonable search and seizure as well as other rights in our State and Federal constitutions were basic policy decisions made early on by those who wrote those documents.

It seems to me fundamentally inappropriate to now recede from the fourth amendment because certain people perceive the problem of crime should be dealt with in this way. It is particularly important to poor people to have the exclusionary rule as a means of protecting their rights from unreasonable searches and seizures and from unreasonable police conduct. I say this at a time when legal services to poor people across the board have been cut back not only in criminal areas in which State and local governments are strapped for funds, but also in civil legal services which, as the chairman knows, have been funded primarily by the Federal Government and which this administration has sought to terminate and on which significant restrictions have been placed on the delivery of those services.

It seems to me illogical and inappropriate at this particular point in time for a new remedy, new hurdles, for poor people who may very well be the primary recipients of these searches and seizures, to get into court, to get before administrative agencies to seek protection. Poor people do not have the wherewithal to do that and their ability is being severely curtailed due to cutbacks in legal services and other programs.

As an organization that is concerned about the legal rights of poor people, NLADA thinks it is significant that in order to pursue most of the rights and remedies suggested by others as alternatives to the exclusionary rule, poor people need lawyers and lawyers will not be forthcoming. Some of the innocent people who are victims of illegal searches and seizures will not have the ability to pursue those other remedies.

Perhaps the comment I would like to make most of all is my perception of what the exclusionary rule does in State court. That is where the greatest impact is. As I view the legislation, the various bills to curtail the fourth amendment and to curtail the exclusionary rule are basically built on the cruel hoax that crime will be reduced.

As a person who has spent most of his professional career representing people in criminal cases, I think it is almost laughable that anyone would suggest that the exclusionary rule has any impact on crime. It would be laughable but for the serious problem facing the Nation in terms of crime.

I point out in my statement that of 2,000 crimes that occur, perhaps 1 case out of those 2,000 crimes will have some impact because of the exclusionary rule. Indeed, most of the crimes that occur are not reported and of most of those reported no arrests are made. Out of those in which arrests are made, less than 1 percent have any impact due to the exclusionary rule.

From my experience in Wisconsin, as well as nationally, there is absolutely no question in my mind but that the exclusionary rule as adopted by the Federal courts and by some State courts has had significant positive effect on police training, police practices, and on the criminal justice system generally. Indeed, when I was State public defender in Wisconsin one of my regular duties was to help train law enforcement officers and explain to them my perception of what a defense lawyer's duty was, what my perception of the law was and how I believe we could comply with the exclusionary rule.

I saw in the 6 years I was State public defender and I have seen since coming to Washington a very significant improvement in police practices, a direct result of the exclusionary rule. I have read positions by various law enforcement organizations who acknowledge that this training has taken place and there has been improvement in these practices but then advocate abolition of the rule because they say it has not worked.

It is clear that criminals do not go free because of the exclusionary rule in any numbers significant enough to be concerned.

Where this rule has been of immeasurable value is improvement of the system and people's perception of the system. Just as the *Miranda* case resulted in vastly improved police procedures, it has improved police practices to the extent that very few criminal cases are thrown out. That is particularly true in low-profile, "mine-run" cases handled by public defenders day in and day out.

My experience is different from Attorney General Sachs. I think the number of cases in which the evidence is suppressed is significantly less than in Federal court. One reason is that the volume is higher. Cases are handled in a summary manner and it is very difficult to get a suppression motion granted in State court. I knew that when I had a suppression motion granted in State court it was a pretty bad search.

The notion that the public has about people going free and judges granting motions on some loophole is something that is false. Those who pursue that point of view do a disservice without looking at the facts and/or talking to people in the communities

who are affected by the exclusionary rule both in terms of the defendants and the victims of those crimes.

There are other remedies for fourth amendment violation, but those remedies are not available to the people our association is concerned about. A person cannot go to the legal service office to sue the police department in court.

The exclusionary rule, to me, is an automatic device to protect everyone's rights. In order for police to deal appropriately with people who commit crimes, they must apply those same standards and rights to all citizens, those who have committed no crime, as well as those who are affluent enough to pursue their rights in court—those people who need particular protection which, in my judgment, can only be afforded through an exclusionary rule the way we have it. A person who is arrested, under our Constitution and most State constitutions, is represented by counsel. Without that, a very significant portion of our society which has daily contact with law enforcement, who are victims and victimized, will not be able to have any redress of these wrongs.

I agree with those who have stated that the exclusionary rule is not within the province of the legislative or executive branches of the Government. It seems to me the exclusionary rule was adopted not only by the U.S. Supreme Court but also by a number of State courts to respond to a very specific problem, that is, that people's rights have been violated and courts have been made a partner in allowing tainted evidence.

It seems to me that it is simply not appropriate for the legislative branch to deal with it, but it is particularly inappropriate when you think about the millions of poor people who do not have protection from the police but through the exclusionary rule, and a large majority of those people who are law-abiding citizens have no other way to redress that grievance but through the litigation that occurs in criminal cases.

I believe strongly that the exclusionary rule protects all citizens, guilty as well as innocent, charged as well as uncharged.

I would urge this Congress to reject efforts to modify, abolish or in any way change the exclusionary rule.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

Do counsel have questions? Mr. Ward.

Mr. WARD. Mr. Eisenberg, I am sure you are aware of the argument that the improvement in police training and education justifies partially abandoning the rule for those police departments that demonstrate a continued effort of compliance with the fourth amendment.

I was wondering if you have a response to that argument, or, if not, would you like to respond to it at a later point?

Mr. EISENBERG. I can respond briefly.

As I said in my statement, on the one hand I do acknowledge that the exclusionary rule has improved police practices, training, procedures, and has developed professionalism within the profession of law enforcement.

The exclusionary rule is self-executing; you don't have to go to an administrative body or develop new sets of regulations. I think to develop these adjuncts will be much more costly, much more dif-

ficult to get through and will exclude people, particularly those people in communities who don't have attorneys or can't get people to represent them.

It is not a logical position to say, on the one hand, the exclusionary rule has worked and, on the other hand, we should abolish it because it has worked.

Mr. WARD. Thank you.

Mr. CONYERS. Counsel Ray Smietanka.

Mr. SMIETANKA. On page 4 of your testimony you cited that of 2,000 crimes it is down to the point where the exclusionary rule would affect the outcome in 1 case or less out of the 2,000 cases. It is true though, isn't it, that the exclusionary rule controls the admission of evidence and would not have any application until a case actually got to trial; is that correct?

Mr. EISENBERG. That is right.

Mr. SMIETANKA. Since 1,400 of the 2,000 cases don't get reported, and of those, 30 don't go to trial, maybe the exclusionary rule has more impact than maybe you have given credit for; is that true?

Mr. EISENBERG. It is still only 1 percent of the total number of cases coming to trial.

Mr. SMIETANKA. That part is true. I am quibbling slightly with you over the use of 1 of 2,000.

Mr. EISENBERG. Perhaps the point I was making in terms of allocation of resources is that it might be better to deal with the majority of the cases which don't ever come to trial than to deal with the 1 percent of the cases. It gives the idea that Congress, by dealing with the exclusionary rule, has dealt with crime.

As I indicated, most crimes don't ever come to the court at all. That is my major point. Congress has to do better, in my judgment, than dealing with the exclusionary rule. The purpose, I assume, at least partially, is this.

Mr. SMIETANKA. There are so many evidentiary rules and not every evidentiary rule affects a great number of cases.

Can you think offhand of any other evidentiary rules that affect a great number of cases?

Mr. EISENBERG. To look at one rule that has some constitutional basis and say this is the one we are going to exclude, particularly with the notion of reducing crime, I think, is an inappropriate way to look at it. That is the point I am making.

I think if you looked at how much evidence is excluded on the basis of certain types of objections, evidentiary or constitutional, the exclusionary rule would be well down the line after most of the common law exclusions and certainly most of the legislative exclusions.

I have had many cases where hearsay is rejected as evidence but very few where evidence is rejected on constitutional grounds. If the issue is to eliminate most evidence, this is certainly not where you start.

Mr. SMIETANKA. Thank you.

Mr. CONYERS. Thank you very much.

Mr. EISENBERG. Thank you, Mr. Chairman.

[The complete statement of Mr. Eisenberg follows:]

STATEMENT OF HOWARD B. EISENBERG ON BEHALF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Mr. Chairman, I am Executive Director of the National Legal Aid and Defender Association (NLADA). Our association was founded in 1911 by members of the private bar concerned about the availability of legal services to poor persons in the United States. Since that time NLADA has grown into a coalition of private lawyers, legal aid and legal services attorneys, public defenders, poor persons, members of the judiciary and other public officials. Our organization remains the only national organization devoted to advocating and assuring that high quality legal services are afforded persons in both civil and criminal cases, regardless of a person's ability to pay counsel.

I am a criminal defense lawyer by training and experience. From 1972 until 1978 I served as State Public Defender of the State of Wisconsin. Since coming to Washington and NLADA I have traveled extensively throughout the United States visiting public defenders and legal services offices. I have learned that not only are the majority of criminal defendants represented by publicly compensated counsel, but most of the victims of crime come from the same community as the defendants. While crime is certainly a problem of national significance, its major impact is on the poor—both as victim and defendant. For this reason our Association has a major concern with present efforts to abolish, "modify," "limit" or "define" the Exclusionary Rule.

Few issues have been studied, debated, and considered as thoroughly as the Exclusionary Rule. Hearings have been held in both Houses of Congress to consider this issue.[1] Today you are hearing from a distinguished group of criminal justice professionals who will provide you with additional insight. To me, however, the issue is straightforward: of what value is the Exclusionary Rule and what will be the ramifications of its abolition or limitation.

Early on in our history certain decisions were made concerning the rights of persons charged with crime. These rights were neither self-evident nor required by the common law. Certainly such rights as trial by jury, counsel, the privilege against self-incrimination, and the right to be free from unreasonable searches and seizures were not designed to make it easier to convict criminal defendants. We must remember that these rights do not apply only to the criminal but to everyone. Each of us has a stake in ensuring that the police, prosecution, and courts meet certain minimal requirements. This emphasis upon the rights of the accused is a fundamental value in our Constitution which separates our system of justice from that in communist or totalitarian countries and which has stood us well for two centuries.

Few rights are as basic as the Fourth Amendment's prohibition on search and seizures, although it is often asserted that the framers of the Constitution did not intend for the Fourth Amendment to bar the admission of illegally seized evidence. While interesting, this argument is of little relevance given the two hundred years which have passed.

The Supreme Court has interpreted the Fourth Amendment prohibition of unreasonable searches and seizures to require the exclusion, for all purposes, of evidence illegally sought or seized. The Exclusionary Rule is therefore implicit in the Fourth Amendment. For the Congress to tinker with such a basic concept is not only a retreat from a fundamental right which separates America from criminal justice systems around the world, it is an unconstitutional invasion on the power of the judicial branch to interpret the Constitution.

Perhaps the most widespread misconception about the Exclusionary Rule is that the rule acts to exclude all illegally seized evidence in every case. This is simply not true. The U.S. Supreme Court has recognized that such inflexibility would keep out evidence the government had discovered on its own without using illegal means. Once a search or seizure has been determined to be illegal, a court must then decide if the evidence is so "tainted" that it cannot be admitted. the U.S. Supreme Court has recognized two ways in which this "taint" can be removed and evidence admitted. The first of these is instances in which the evidence was obtained from an "independent source." See *Silverthorne Lumber Co.* v. *U.S.,* 251 U.S. 385 (1920). Under this test the government must show that leads or information developed by the police and unrelated to the illegal search led to the discovery of the evidence.

The second exception is where tainted evidence can be admitted if the prosecution shows that the evidence acquired by illegal means inevitably would have been ob-

[1] I would specifically commend to you the written testimony of Professor William Greenhalgh given before this committee on June 2, 1982. It is a clear, concise, and thorough analysis of the Exclusionary Rule.

tained by legal means. See *U.S.* v. *Crews,* 26 Cr.L. 3158 (3/25/80). Such evidence is excluded only when the prosecution cannot show the existence of an independent source for discovering the evidence.

Any Congressional modification of the Exclusionary Rule would amount to but a symbolic gesture. While apparently intended to "fight crime," efforts to abolish the rule can have no real impact on crime, and in fact only serve to divert attention from seeking real solutions. When one considers that only 30 percent of all crimes are reported and only 21 percent of all reported crimes result in arrest,[2] it suggests that Congress is addressing the wrong issue by looking exclusively at the adjudicating process in federal courts. Moreover, the one study done on the impact of the Exclusionary Rule in federal courts found that in only 1.3 percent of the cases was evidence excluded and in less than 1 percent did this exclusion affect the outcome in the case.[3] Thus out of 2,000 crimes committed only 600 will be reported, in only 170 will arrests be made, and the Exclusionary Rule will affect the result in one case or less out of the original 2,000 crimes which occur. Considering further that Congress can only adopt legislation to apply to federal courts, and that the large majority of violent (and other) crimes are prosecuted in state courts, any suggestion that this type of legislation will reduce crime is not only incorrect, it is a disingenuous ploy to make it appear that Congress is "getting tougher on crime."

These statistics I have quoted are often used to support abolition of the rule since "it doesn't work anyway." Every public defender knows that the burden is heavily on the defense in asserting any type of suppression motion. Judges are extremely reluctant to grant such motions, particularly in the many "routine" cases involving indigents. To any one providing representation to poor people in criminal cases the assertion that significant numbers of defendants "go free" because of the Exclusionary Rule is—frankly—laughable. The assertion that crime will be reduced by modification of the rule by Congress is a cruel hoax being perpetrated on the American people by those who should know better.

Yet the real ramification of the rule has been in improved police education and procedures. It is ironic to me that many of those now favoring abolition of the rule point with pride to the improved police procedures which have been adopted as a direct consequence of the rule. To assert now that the rule should be eliminated is both illogical and insensitive to the abuse by law enforcement which led to the rule's creation. Contrary to the repeated assertions made, the Exclusionary Rule has worked and is working today to improve police practices without resulting in "criminals going free."

I can understand the public's frustration with the criminal justice system. By any measure the state systems are severely underfunded and understaffed. This lack of resources leads to the necessity of disposing of cases in a way not always consistent with justice. Sometimes this injustice is done to the public, but other times the defendant is dealt with summarily due to inadequate time and resources. All too often persons within the system—including some defense lawyers—have a political, personal, or financial interest in an outcome not consistent with justice. I am certain that the Exclusionary Rule adds to the public's frustration, particularly in view of the way it is characterized by those who seek to abolish the rule. Yet it is simply not responsible for Congress to choose this rule—applying only in federal court—as a way to enhance the public's respect for our criminal justice system. Members of Congress of both political parties, liberal and conservative, as well as both Presidents Carter and Reagan, worked to abolish the the Law Enforcement Assistance Administration (LEAA) without any consideration being given to the many LEAA projects which certainly improved the law enforcement and adjudicatory systems and may have even reduced crime. If Congress were truly concerned about improving the operation of the system of justice, it should review what was done by LEAA and move toward funding projects demonstrated to enhance the process.

There may well be other ways to remedy Fourth Amendment violations. Some civil remedies already exist. The fact is, however, that the Exclusionary Rule is the least expensive way to protect all citizens. The maintenance of this rule assures that

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[2] Law Enforcement Assistance Administration, "Criminal Victimization in the United States, 1978", 12–14 (1980) (only 30 percent of crimes reported to police); Federal Bureau of Investigation, Uniform Crime Reports 175 (1979) (only 21 percent of reported crimes in 1978 resulted in an arrest).

Because career or habitual criminals generally commit more than one crime per year, "clearance rate" statistics (which relate arrests to the number of crimes) probably understate the proportion of criminals who are arrested each year. See, C. Silberman, "Criminal Violence, Criminal Justice," 101–02 (1978).

[3] Comptroller General of the United States, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions", Rep. No. GGD–79–45 (19 April 1979).

law enforcement officers are mindful of everyone's rights—not just those accused of committing crime. A tort remedy already exists when appropriate, but most often a person not ultimately charged with a crime has insufficient resources to pursue such claim unless the alleged violation is truly outrageous and the likelihood of substantial damages very high. The beauty of the Exclusionary Rule is that it assures judicial determination of the legality of the actions of police in a way which can then protect everyone. No other remedy suggested provides this broad-scale impact at so low a cost.

Mr. Chairman, I submit that the Exclusionary Rule is the means which courts have adopted for enforcing the fundamental principle embodied in the Fourth Amendment. The rule has resulted in manifestly improved police procedures, though only in a tiny number of cases has the prosecution been affected by the exclusion of evidence under the rule.

Any modification of the rule by Congress would not only impermissibly invade the authority of the judiciary but would also indicate a retreat from this basic constitutional safeguard. The Exclusionary Rule is the most effective and least costly way of assuring that all citizens are protected from violations of the Fourth Amendment.

Most of all, however, changing the Exclusionary Rule will not have any effect on crime. Moreover, efforts to adopt such legislation divert the Congress and the nation from seeking effective solutions to the problem of crime in our country. We urge the Congress to reject efforts to modify the Exclusionary Rule.

Mr. CONYERS. We now call the Federal public defender for the southern district of California, Mr. John Cleary, executive director, whose testimony will be given on behalf of the Federal defenders. He is widely experienced in dealing with the criminal justice system. He has testified on behalf of a number of other organizations and he is very welcome before the committee.

TESTIMONY OF JOHN CLEARY, FEDERAL DEFENDER, SOUTHERN DISTRICT OF CALIFORNIA, ON BEHALF OF THE FEDERAL DEFENDERS

Mr. CLEARY. Thank you very much for having me.

I would like to point out—I want to compliment the House for anticipating the onslaught it is going to get with this legislation by first trying to measure the depths of the problems.

The speakers who have preceded me not only today but also previously give a bird's-eye view of the Federal criminal justice system; that is to say, from a long distance where they can make ethereal statements that will impact on all 50 jurisdictions as well as the Federal jurisdiction. Mine is a little narrower, so in some respects I am scared and therefore disoriented sometimes with my perception of things.

I had the advantage, for example, last Friday, of being in a Federal district court, one of those rare birds we are talking about, and having a motion to suppress before a real, live judge, and that motion being, after 2 days of hearings, denied.

Now I am here representing 39 Federal defenders throughout the United States within the 94 districts. Our perception of the exclusionary rule, its impact on the criminal justice system and how it cuts people loose, is illusory at best, deceptive at worst. It is a basis for political rhetoric.

I think it goes against the responsibility of Congressmen to act without research or getting some of the facts.

A little fact, and kind of a personal one, is that I have been in defenders' service for almost 18 years. My first 3½ years law experience were spent in the military, where I did have motions to suppress granted. I then served 4 years as deputy director of the na-

tional defenders for the National Legal Defenders Association, where we established defender offices throughout the United States—Boston, Florida, California, and many other States.

In 1970 I served as an attorney in residence in charge of courts, prosecution and defense with the Illinois Law Enforcement Commission. This State agency had direct contact with the local criminal justice system.

Since April 1971, I have been a down-home, friendly Federal defender in San Diego. I go to court before real judges and hear how stupid I am. It is kind of nice to come to Congress and talk to somebody who will listen.

Mr. CONYERS. I never heard the judges say, "Go to Congress."

Mr. CLEARY. They tell me regularly to come to Congress.

Mr. CONYERS. From California?

Mr. CLEARY. From California. In fact, most of the time they know I am going to lose in the court of appeals and will never get reviewed by certiorari. "If you don't like what I am saying, go to Congress." I think the Congressman has been aware I am seeking voir dire for counsel.

The point that I thought was interesting was that when I look in the mirror in the morning I say, "Mirror, mirror on the wall, I may not be the fairest of them all, but I like to think that I am a competent attorney."

In 11 years as a Federal defender, taking cases regularly, including last Friday, I never had a motion to suppress evidence granted.

The other aspect is that in serious Federal crimes, 70 percent of the defendants need appointed counsel. They are stuck with either appointed counsel or Federal defenders. Sometimes we are—not so euphemistically—characterized as "dump trucks" or "You get what you pay for and I want a real lawyer."

I am not trying to intimate that Congressmen should have to go through the criminal justice system, but if they had a chance to see it from our——

Mr. CONYERS. Do you mean voluntarily or involuntarily?

Mr. CLEARY. I would like to see it voluntarily. Nobody was sensitive to the imbalance of the Federal criminal justice system until all of a sudden Congressmen were "invited." Now Congressmen are startled by archaic and unfair procedures that exist in Federal court. I would like to see a Congressman sit incognito in the back of the Federal courtroom in immigration cases. I am shocked by the way we prosecute immigration cases. Most illegal aliens are from Mexico, but these criminal prosecutions are inconsistent with the writing on the Statue of Liberty: "Send these, the homeless, tempest-tossed to me" and "we will try to get you 30 months probation." It is a strange twist to the American dream. We see it every day, and it is frightening.

There are two types of legislation before you—either straight out nullification of the exclusionary rule or the good-faith exception.

The development of the rule basically started with *Weeks* v. *United States* (1914). I like *Weeks*. Mr. Jensen in his statement, for example, referred to deterrence of law enforcement officers. You can't show me one word in *Weeks* on deterrence as a purpose of the exclusionary rule.

The two bases for the rule are: First, the fourth amendment is self-executing. If you do not exclude the evidence you might as well strike the fourth amendment from the Constitution. The Constitution would be meaningless.

Second, the imperative of judicial integrity. If I might be so bold, I would refer to the imperative of congressional integrity, because when you take office you raise your right hand and swear you will uphold the Constitution of the United States, which includes the fourth amendment. So, if you are operating under past laws that will abolish the exclusionary rule, you are going against your oath of office.

In 1920 we had a latent Bolshevik on the U.S. Supreme Court. In *Silverthorne* v. *United States*, the prosecutor, having been stunned by *Weeks*, had seized evidence illegally and made copies of it, in a motion for return of illegally seized evidence, he returned the originals but at trial introduced the copies. When the copies were introduced as the best evidence available, the defendant moved to suppress. The Government said, "No, we gave you back the originals." The defense lawyer said, "I object." What the Government wants, that is what the Government gets. It came to the Supreme Court and the latent Bolshevik writing threw the evidence out because he said, "Otherwise, it reduces the fourth amendment to a form of words." That Bolshevik was Oliver Wendel Holmes, Jr.

Not many people realize that the *Monroe* v. *Pape* decision, which is in my statement, recognized that the 14th amendment due process clause protected the 14th amendment fundamental right of privacy. It was only in 1961 in *Mapp* v. *Ohio* that a rule was defined, not discovered so to speak, as being of a constitutional magnitude.

I always like to cite the author of that rule, Thomas Clark, who was castigated as Attorney General in charge of the detention of Japanese-Amercans in World War II, who became a believer. Justice Tom Clark, the former Attorney General, expressly rejected Cardozo's oft-cited quote in 1927, which is, "The criminal is to go free because the constable has blundered."

That quote best describes the present attitude of the Supreme Court. The new change crystallized with *Stone* v. *Powell* in 1976.

Congress is working with the premise that the exclusionary rule is cutting many people loose. It is the responsibility of the Congress to look at its coordinate branch, the judiciary, and to see how they are responding to search and seizure questions before it intervenes, because we should have a system of checks and balances.

For the October term, 1981, there were three requests for certiorari for the Supreme Court to review search and seizure where the defendants had lost in the courts below, a State court or Federal court. The Supreme Court grants discretionary review in approximately 200 cases a year, but seldom explains its denials.

Those defendant requests were denied over vigorous dissent, the court refused to hear defendants seeking relief. Since the term started prosecutors have obtained review (certiorari) in three cases. Four prosecutors in the lower courts lost out, *Florida* v. *Brady, United States* v. *Villamonte-Marquez,* on reasonable suspicion required for boarding ships in inland waters. *United States* v. *Place,* which dealt with the detention of a person's luggage in an airport for 2 hours on reasonable suspicion. The Supreme Court appears to

favor prosecutors in grant of review on fourth amendment as well as other criminal law issues.

Two cases decided this term deal with the search and seizure question. The first one was *Washington* v. *Chrisman*. That means that the prosecution again was asking for relief.

Who wins when the prosecution requests relief? The prosecution wins. In that case a youth was apprehended in a dormitory for unlawful possession of alcohol. The entry into the room was considered coextensive with the effort to obtain his identification.

The other case, *U.S.* v. *Ross*. Who was the one requesting relief? The prosecutor. Who wins? The prosecutor. The court is not insensitive to law enforcement's needs and has continually contracted the exclusionary rule. In *Ross* the police in an auto search may look anywhere and in any container without a warrant. One's privacy in an auto must be subordinated to the needs of the police.

I think that the courts have gone overboard in trying to satisfy the pragmatic need; as claimed by police departments which are totally inconsistent with the rights of the people. Congress has not always been at its best in protecting individual privacy. Congress has helped the police by allowing telephonic search warrants. Congress has created some rules requiring suppression of evidence; that is, wiretaps, but Congress should be more concerned about overreaching of Government—the executive—agents rather than giving them blanket immunity.

One of the great anomalies we have in our law is electronic eavesdropping, say, for looking for further Abscam violations. If the FBI were to start taping willy-nilly certain Congressmen, the question is, could that evidence under the fourth amendment be used before a grand jury?

Under the Supreme Court precedent, you can bet your boots it could be used. Under *United States* v. *Calandra* this is merely an investigatory phase; nothing is barred by the Constitution. But because of the wiretap statute it cannot be used. Because it violated a congressional statute, it would be inadmissible. That evidence measured against the Constitution would be admissible.

Do you want to run down and amend the statute so that they can start using this wiretap evidence. Do you want the constitutional standard as that minimum floor? I think not.

Another example of the court's bending to the police is found in *United States* v. *Miller*. The defendant was operating a still and the enthusiastic agents wanted to get his bank records. The banks were fastidious and turned over the records after production of a subpena for a grand jury not in session. When the defense discovered agent falsification, they made a motion to suppress. The evidence was suppressed in the lower court and affirmed by the fifth circuit. The Supreme Court granted review and had to rule on the propriety of the illegal subpena. The court avoided that issue by holding that there was no reasonable expectation of privacy in bank records. What did Congress do? The toothless and useless Financial Privacy Act of 1978. It did zip, nothing. That act had no provision for exclusion of evidence; it had no criminal penalty if a violation of that statute were to occur.

In response to *Zurcher* v. *Stanford Daily*, Congress passed the Privacy Protection Act of 1980. That act—thank God—does not

cover the individual citizen, only academia and the media. If Federal agents invaded my privacy I could bring a suit against the offending Federal offices under the Federal Tort Claims Act and in a *Bivens* action I could demand jury trial and seek punitive damages. If I were a professor at a law school and was doing a survey on government and they seized my papers, I would have no jury trial and have a right of action only against the Government.

The States have responded—and I think this is covered by some of the other papers presented. When the Supreme Court justified blanket inventory searches of automobiles in *South Dakota* v. *Opperman,* the South Dakota Supreme Court held therefter this willy-nilly complete search of the automobile was prohibited by their State's constitution.

The Financial Privacy Act of 1978 protecting bank records, credit card records, and other financial records was inadequate, and States such as Oregon, Nevada, and other jurisdictions adopted better laws. As an analogy I would like to compare Congress' role in creating. Imagine that the Federal Constitution requires the people who work be paid $1 an hour and that there is a Federal statute that requires a person be paid a minimum of $3 an hour. Of course, Congress might pay Government employees more than $3 an hour. Say Alaska had a law that required its employees or people working in the State jurisdiction to be paid a minimum of $4 an hour. For you to pass a law that would rely on good faith exception to the exclusionary rule would be, in effect, saying that people are not to be paid in excess of 50 cents an hour.

Now, when you realize the intrusion on both State and Federal law with that type of legislation, I think you should understand the kind of congressional usurpation of a delicate balance without its considering the consequences.

The alternatives for the exclusionary rule have been unrealistically touted as viable. First, the criminal alternative. In the FBI "black bag job" case, *United States* v. *Mark Felt and Edward Miller,* the prosecutor told the jury to make the Constitution and the fourth amendment ring out loud and clear. The jury convicted those two agents. The judge was embarrassed—"I am sorry; I will give you a fine." Jail time for violating the Constitution? No way; a fine. In March 1981 the administration pardoned both those individuals. Their appeals are going forward. That case is not over.

Criminal contempt. This is a classic. Imagine when the suspect comes in with a stolen TV and the judge says, "Motion to suppress denied. You, the defendant, 15 months in State prison; take him away. You, Officer Jones, violated the fourth amendment, 30 days; take him away." That is judicial Alice in Wonderland.

When we get such zealous judicial enforcement of the Constitution by judges, I will believe it when I see it. It is nice for academic discussion.

Internal discipline. Police officers investigating one another think of St. Paul's adage that "There but for the grace of God go I." Chicago policeman Jack Muller, when asked to characterize internal investigation of the Chicago Police Department, described it as a great big washing machine; everything you put in it comes out clean.

The Police Executive Research Forum suggested that this Congress not consider the exclusionary rule, that it should be left to the court, that the police do it best themselves by focusing on three areas—first, establishing regulations; two, having some type of training; and, three, disciplinary procedures.

Well, regulations and training we now have. The good faith makes ignorance a virtue. The third means, discipline, has always been on the books but it is seldom enforced. I can echo what the attorney general from Maryland said, it is used in only the most egregious cases. A recent example came from Chicago where they had dope-dealing by policemen from police cars, kind of like Good Humor sales of heroin; then and only then did it rise to the level of criminal sanction so that the chief of police said, "See what we discovered on our own."

In Los Angeles we have burglary on demand engineered by police officers. That has come under public criticism, but in the area of someone being "thumped" on the street or a door kicked in, those things will not percolate up through the internal investigative division. Civil actions are rather useless, again because they are rights on the books but not in actuality.

For Federal civil actions for State officers, we have *Monroe* v. *Pape,* and for Federal officers, we have the *Bivens* action.

Many years ago, my father, a Chicago police officer, was involved in a shooting incident; the defendant was discharged and gave my father a release. He asked me to explain it to him. I asked him, "What do you think about being sued for your alleged misconduct?" He said, "Better that murderers walk the streets free than I have a lien on my house." The point was that exposure to personal pecuniary liability did affect him.

Congress is seeking to remove this incentive for good behavior by giving immunity to Federal agents.

Actions against the Government. Congress operates in strange ways. In 1974 with the unfortunate experience of the Collinsville raid in Illinois, you amended the Federal Court of Claims Act——

Mr. CONYERS. Excuse me. I am going to have to depart for a vote on the floor. I will be right back.

[Recess.]

Mr. CONYERS. The subcommittee will come to order.

Please proceed.

Mr. CLEARY. Thank you very much.

I know that some previous speakers have talked on evidence and some of the questions turned on evidence being excluded. The exclusionary rule is not the sole reason for exclusion, but there are other constitutional requirements and "truth" is not always the ultimate test of admissibility.

One of the classic cases was when an individual who was being interrogated was hung, and as he was hung he was whipped because he started to lose consciousness, so the police let him down only to repeat the process until he confessed.

The State supreme court held that although this was not the more appropriate police interrogation procedure, the statement was trustworthy and, therefore, admissible. The Supreme Court of the United States reversed and said there was a little thing called voluntariness that was required in our system. That was *Brown* v.

Mississippi in 1936. It was held not to be creating any undue burden on the police.

Today, one could facetiously say that under the good faith test this might be good-faith interrogation because the poor, stupid officer didn't know you could not use a cattle prod to pursue an interrogation.

The other problem in these hearings is that we tend to disregard State as well as Federal laws. Physician heal thyself. Most of your legislation affects only Federal courts, not State courts. I again refer to that political placebo, the Privacy Protection Act of 1980. God save us from Congress. That act does extend to State officers. Again, when Congress steps in, we all suffer from it and we don't know the ultimate impact of that legislation because it has only been effective for approximately 8 months.

Let us look at the Federal system—homicide, rape, robbery, burglary, and assault constituted 7 percent of last year's criminal caseload; 25 percent was embezzlement and fraud, meaning we don't have the violent crimes which are the common subject matter of the State jurisdiction. In those, Congressmen representing a community from within a State should consider supplying appropriate assistance to the State, but we should not confuse limited Federal jurisdiction with that which the States must handle.

Second, on the good faith exception, I have in my paper cited scholars and academicians who have roundly criticized the rule.

Justice Potter Stewart, who recently retired from the Supreme Court, did not concur, he did not join in, the opinion of *Mapp* v. *Ohio*. When recently asked what he thought about it, he said, basically you are going to make an intolerable burden for judges. How can they determine the state of mind of the police officer? What you are going to do is reduce it to a totally subjective test which is inconsistent with the rule of law.

Justice Stevens on June 1 in *United States* v. *Ross* said we are not announcing a good faith exception. I like to think maybe the Supreme Court was telling another branch of the Government that good faith doesn't fly.

The third authority is Professor LaFave who wrote a comprehensive work on search and seizure, which has been cited by the Supreme Court and most of those in the field. He is a professor at the University of Illinois Law School. Some of us consider him moderate and conservative on search and seizure law, but he is the recognized comprehensive compiler of the law.

He points out four adverse consequences to the good faith rule if it were adopted: First, it freezes the law in its tracks. Every question of search and seizure mixes law and fact. Unless you can find an exact precedent in the past you can't grant a motion to suppress. So officers, or anybody asking advice on what is a factual situation, will have no guidance. Second, a subjective test would place an intolerable burden on decisionmakers. Third, it shows a pro-police/anti-fourth-amendment bias by the very adoption of the law. You are kind of creating that. The last objection he said was that it would be kind of like a green light to the police, an open-ended license that anything goes.

Those would be really terrible consequences to deal with a good-faith effort by Congressmen passing a good faith exception to the fourth amendment exclusionary rule.

One of the other perspectives we deal with is police perjury. I told you before my perspective is down there at the "intake" level. I can't give you the general viewpoint, only what I encounter in the courtroom. I continue to see this day in and day out. In the short time I have, I will try to summarize it:

One, how does the system work? The system works when you make a motion to suppress evidence by having an evidentiary hearing. The officer then can come in and use the magic words, such as "They consented." If they consent, neither probable cause or a search warrant is required. If you read *United States* v. *Matlock,* 415 U.S. 164 (1974), the Supreme Court decision, where the mistress of the bankrobber, according to the FBI agent, said, "Please come in and search my closet and find the bait money my boyfriend took in the diaper bag." She testified at the trial where she denied it. The trial judge believed the officer; therefore, consent; therefore, it was admitted.

The second aspect is exactly that. The officer knows that it is his word against the defendant, friend or third party. Who is going to be able to, under the judge's weighing scale, be more believeable than the police officer? The only time I ever saw it occur was where the officer thought—during the interim the defendant had taken the stand and there was a question of how long after the announcement "Police open up" he waited before he kicked in the door of the house—he said he waited at least 40 seconds. The defendant had claimed or alleged in the moving papers that it was instantaneous. However, there was a witness to the police breaking into the house. He was doing his running exercises outside the house that was broken into.

The agent got back on the stand and said, "Now, if a witness said the announcement and entry were simultaneous, that witness would be a liar." So said the agent. It turned out the witness was the Chief of the Criminal Division of the U.S. Attorney's Office who had testified. The judge said, "Well, I think we should continue this case until tomorrow," and the Government dismissed the case.

Those are rare, rare events.

Maybe with Pope John Paul II as another witness you might qualify for this disputation that will be resolved against the law enforcement agency, but the law enforcement officers know in advance that any factual disputation will be resolved in their favor.

Third, when the district court makes the decision, that court determines the facts. In a motion hearing we bring in a factual dispute and say, "My client was 'thumped' and they rolled over him when they came into the apartment." The judge says, "I have considered the facts in the case and I have had a chance to decide the credibility of the witnesses and I find Officer Jones, a sparkling denizen of our community, has no ax to grind in this matter, and I discount the self-serving statement of the defendant." No review court can review the facts. Accepting all the police statements as true, the only review is under the clearly erroneous test.

The chances for successful appeal are too small to consider. If we want "to go upstairs," we know from the statistics that only one out of eight criminal cases gets reversed. That is not saying very much when a person is facing some type of need to resolve a case at the trial level before sentence is imposed.

Therefore, I think you can understand why so few motions to suppress, in fact, are ever granted.

The last thing I would like to discuss is my three alternatives:

First, I would suggest the appointment of counsel and their compensation in civil rights actions against Federal officers. The Congress did several years back provide for a Civil Rights Attorney's Fees Act, in the event that the party prevailed. Many times we might not be able to prevail and much like in the civil rights EEOC legislation of 1964, there could be a provision for discretionary appointment of counsel if reasonable cause is shown to the court that a Federal officer committed an illegal search or seizure.

The second recommendation I have—and this is awkward for me—I am recommending a special prosecutor, not a grandiose special prosecutor for high Government officials but kind of a local special Federal prosecutor. In a situation where the officers have been carried away, if there is reasonable grounds, a district court, in its discretion, again, could appoint counsel, even, for example, a Federal Defender, to go forward before a grand jury to see if a case could be proved to the grand jury, and if it could be proved to the grand jury, then prosecuted; and that individual would have the same authority as the U.S. attorney.

This would relieve the U.S. attorney from making very difficult discretionary determinations after saying, "I have the evidence in this case but overall I am going to give the offending officer a break."

The last suggestion stems from a belief the national Government sometimes loses its sense of grassroots. I would like to suggest a local police review board for each Federal district. In some cases it would be one State, like Arizona. A local review board would be created by Congress to review complaints against Federal officers who engage in illegal searches and seizures, with the power of his group solely to formally censure officers and to recommend, for example, suspension or removal, but that, of course, would be left up to the Federal agency to make a comprehensive review. The local review board, I think, then would provide sensitivity at a local level concerning the appropriateness of the action and also preserve the fundamental issue, which is accountability of officers, not just merely genuflecting to Washington but responding to the local community, something that the Federal Government has forgotten.

Finally, I raise a moral question. President Reagan distinguishes our system of government from the Soviets on the ground that we do not use any means to achieve a given end. "The end does not justify the means. In the law of search and seizure, the end does justify the means." The cops have to put the bad guys away, say what you have to, whether you lie or whatever. It is a pernicious role. Even the scholars indicate they are hostile to the exclusionary rule; they don't believe the exclusionary rule really works. They want Congress and everybody to put away the charade and say let

us do it—engage in any police misconduct. Unfortunately, we do away with the foundation of accountable government.

I would suggest a careful deliberation of the extent of the problem, especially in Federal courts. Two, that Congress seriously consider the suggestions that I make which do not require any substantial structural change but merely supplement what Congress already has on the books as some limited protection of the right of privacy. After a period of time, after factual information were gathered, then determine whether or not these remedies that are now proposed are appropriate.

I thank you very much.

Mr. CONYERS. Thank you very much, Mr. Cleary.

Could you tell me whether you have examined the Federal law with regard to the civil remedy for violation of search and seizure. Can you recommend whether or not we ought to consider making it easier to bring suit?

Mr. CLEARY. With my statement I touch upon the fact that Congress has already done something, in 1974, with the Federal Tort Claims Act amendment, to allow an action against the United States as well as the individual officer. The trouble is, you give a remedy without the right of redress. That is to say you create a theoretical remedy.

To that extent, I like to compare our laws to those of the Soviet Union. On the books they give a lot of rights, but they don't deliver much in court. Our society has been noted for delivery and protection of individual rights.

My suggestion was—and I am not saying it is open-ended—my first recommendation is that when it is shown by petition to the court that there is reasonable grounds, probable cause, if you will, that a person's rights have been violated, that the court can at that time appoint counsel, so that that counsel, even if the effort were unsuccessful, can be compensated.

If you remember when the statute was created providing an action againt the Government, if an FBI agent were sued or an official of the Government were sued in a civil action, the U.S. Government could not represent them because they were also subject to suit. So they would have to appoint outside lawyers who several years ago were drawing $100 an hour and in one case I understood counsel received $100,000 for representing a Federal official as a defendant in a civil rights action.

I am not asking that those astronomical sums be provided. I am only saying that counsel should be told even if his case goes before a jury and the jury says, "No, there was probable cause and therefore your efforts will be at least rewarded at least on par with what the Criminal Justice Act provides, $20 or $30 an hour." In that way there is minimal compensation for offsetting extensive cost for initiating a civil suit. That is my recommendation.

Right now, the recommendation is only a theory. If police officers were asked would you want me suing you in a civil court, you would hear these police officers favor the exclusionary rule as an alternative to viable threat of a civil suit.

The answer is that the redress available in a civil suit just prolongs the agony, whereas the exclusionary rule itself is a one-time adjustment.

Second, the Supreme Court says if you lose the motion to suppress, that operates as collateral estoppel in a civil suit.

The point is, clearly, something has to be done to make the right to counsel meaningful. In 1964 under the laws of the United States, if you were charged as a bankrobber you were entitled to an appointed, free lawyer. The attorney received no compensation, no money, no payment for out-of-pocket expenses. Congress recognized this was unfair and to implement the sixth amendment provided the first step in the compensation.

I am saying we have reached the stage now to realize we are going to provide remedies on the books and to make it other than a hollow sounding, empty-worded covenant that we provide the means for enforcement.

There are 39 Federal Defender officers in the United States. They either receive a budget or a grant and the court can appoint us so that we can absorb that in our record case law without difficulty for the system to bear. I think that is one of the ways to make the civil remedy viable—after legislation like that is passed to see what impact it might have. I don't think we have to run off and make these radical structural changes to abolish or destroy the exclusionary rule.

Mr. CONYERS. We are very grateful for your joining us at this hearing. I hope that this will not be the last time that you follow the advice of one of the judges, "to come to Congress."

Mr. CLEARY. Thank you very much.

[The complete statement of Mr. Cleary follows:]

STATEMENT OF JOHN J. CLEARY, EXECUTIVE DIRECTOR OF FEDERAL DEFENDERS OF SAN DIEGO, INC., THE FEDERAL COMMUNITY DEFENDER ORGANIZATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA ON BEHALF OF THE FEDERAL DEFENDERS OF THE UNITED STATES

SUMMARY

Of Tyranny

There are two sorts of tyranny; the one real, which arises from the oppressions of government; the other is seated in opinion, and is sure to be felt whenever those who govern, establish things shocking to the turn of thought, and inconsistent with the ideas of a nation.—Montesquieu, "The Spirit of Laws" (1748)

Present legislation is unnecessary given the Supreme Court's narrowing interpretation of the Fourth Amendment exclusionary rule. The exclusionary rule promulgated by the Supreme Court has been in effect in the federal courts almost 70 years. The Supreme Court has forcefully curtailed relief in criminal cases in deference to law enforcement needs. Congress should devote its efforts to reform of the federal criminal justice system which complements and supports the state criminal justice systems. The "good faith" exception makes police officer ignorance a virtue. Something should be done to counter the existing impression that the system now countenances police perjury. Existing alternatives to the rule are not viable, and Congress might first seek to shore up civil remedies by providing for paid counsel to sue offending officers (who have government-paid lawyers defend them). Congress might also create special prosecutors to enforce the criminal law proscribing unlawful searches and seizures.

INTRODUCTION

There are 32 federal public defenders and seven federal community defender organizations, a total of 39 federal defenders, who provide representation for the criminally accused in federal court who are financially unable to employ counsel. Approximately 70 percent of those charged with a serious federal crime are unable to retain their own attorneys, and federal defenders represent approximately one-half

of this number.[1] Federal defenders are restricted solely to federal criminal cases, and provide representation in a fashion similar to retained or individually appointed counsel.[2] With day-to-day exposure to federal criminal practice federal defenders have a "trench level" perspective of how the exclusionary rule works in federal courts, which is the unique concern of proposed legislative cures, i.e. S. 101 and S. 751.

FOUNDATION, DEVELOPMENT, AND EROSION OF THE FOURTH AMENDMENT

In 1914, the Supreme Court in the exercise of its supervisory authority over federal courts fashioned the exclusionary rule to implement the Fourth Amendment in *Weeks* v. *United States,* 232 U.S. 383, which announced that evidence seized by federal officers in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures would not be used in a federal criminal case. The Supreme Court did not apply the rule to state cases, for the Fourteenth Amendment Due Process Clause was sufficient only to protect the fundamental right of privacy but not to require application of the exclusionary rule in state criminal proceedings. *Wolf* v. *Colorado,* 338 U.S. 25 (1949). The exclusionary rule was held not to be an essential component of the right of privacy guaranteed by the Fourth Amendment, but simply a means of enforcing that right. The states were free under the Federal Constitution to accept or to reject it.

The exclusionary rule of the Fourth Amendment was applicable to federal law enforcement officers but not to state law enforcement officers and created such anomalies as the "silver platter doctrine," which permitted admissibility in a federal criminal proceeding of evidence illegally seized by state officers but not by federal officers. The federal courts finally refused to accept the unconstitutional actions of state officers and abolished the "silver platter" doctrine. When judges appear to become "accomplices in the willful disobedience of a Constitution they are sworn to uphold," we imperil the very foundation of our people's trust in their government on which our democracy rests. *Elkins* v. *United States,* 364 U.S. 206, 223 (1960).

Next in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the Supreme Court applied the federal exclusionary rule to all state criminal proceedings. Former Attorney General Tom Clark, who was a principal in the internment of Japanese Americans during World War II, was the author of the opinion. The "weighty testimony" of Justice Cardozo in *People* v. *Defore,* 150 N.E. 585, 589 (N.Y. 1926) ("the criminal is to go free because the constable had blundered"), was outweighed by the consideration of "the imperative of judicial integrity," for he said, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly then its failure to observe its own laws, or worse, its disregard of the charter of its own existence." He concluded:

"Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity as necessary in the true administration of justice.[3]

In 1965, the exclusionary rule was held available to a state prisoner seeking federal habeas corpus post-conviction relief from his state conviction.[4] In *Kaufman* v. *United States,* 394 U.S. 217 (1969), a federal prisoner seeking post-conviction relief could use the exclusionary rule because a state prisoner had the right on federal post-conviction attack.

Ten years after *Mapp,* individual Supreme Court justices questioned the efficiency of the exclusionary rule.[5] The first announced effort to curtail the exclusionary rule came in 1976, for state prisoners in a federal post-conviction proceeding could no

[1] The Sixth Amendment right to the effective assistance of counsel is implemented by the Criminal Justice Act (18 U.S.C. § 3006A).

[2] There is no distinction between appointed and retained counsel in the sense of professional responsibility, and that holds true for federal defenders. *Ferri* v. *Ackerman,* 444 U.S. 193 (1979). See also *Polk County* v. *Dodson,* 102 S.Ct. 445 (1981).

[3] *Mapp* v. *Ohio,* 367 U.S. 643, 653, 659, 660 (1961).

[4] *Henry* v. *Mississippi,* 379 U.S. 443, 452-53 (1965).

[5] *Bivens* v. *Six Unnamed Federal Agents,* 403 U.S. 388, 411 (1971) (dissenting opinion of Chief Justice Burger); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 250 (1973) (concurring opinion of Justice Powell); *Cardwell* v. *Lewis,* 417 U.S. 583, 596 (1974) (concurring opinion of Justice Powell); and *Lefkowitz* v. *Newsome,* 420 U.S. 283, 302 (1975) (dissenting opinion of Justice Powell).

longer challenge an unlawful search and seizure.[6] Relief is also denied by narrowly restricting those who may assert it.[7]

This term the Supreme Court has continued to hammer away at the exclusionary rule. If the lower courts interpret the Fourth Amendment favorably to a defendant, then the prosecutor's request for review, certiorari, has a chance of being granted. If the defendant loses in the lower court, chances for review are most unlikely.[8]

This term the Supreme Court has decided two search and seizure cases. In *Washington* v. *Chrisman,* ——U.S.——, 30 Crim.L.Rep. 3041 (13 January 1982), a university police officer arrested a student under 21 with alcohol and accompanied him into his dormitory room to obtain the student's identification. There the officer found marijuana and after a search also found LSD. The Supreme Court of Washington had reversed the conviction because the entry of the police officer was not based on "exigent circumstances." The U.S. Supreme Court reversed and upheld the search as part of the "plain view" exception to the Fourth Amendment. In *United States* v. *Ross,* ——U.S.——, 31 Crim.L.Rep. 3051 (1 June 1982), the U.S. Supreme Court again reversed a lower appellate court that under the Fourth Amendment required the intervention of a warrant for the search of containers found in an automobile. The Courts and Congress have wholeheartedly facilitated police searches,[9] but the indirect abolition of the Fourth Amendment defies the Constitution and denigrates the right of privacy of citizens.

CONGRESSIONAL RESPONSES TO SEARCH AND SEIZURE QUESTIONS

The Supreme Court has generated a need for Congressional response by abrogating the fundamental right of privacy recognized by all citizens but found by the Supreme Court not protected by the Fourth Amendment. A classic case is *United States* v. *Miller,* 425 U.S. 435 (1976), where federal agents using nonexistent grand jury subpoenas obtained bank records of a suspect. The federal court of appeals, because of the egregious action of the federal agents, suppressed the evidence, but the Supreme Court reversed on the grounds that a citizen of the United States had no reasonable expectation of privacy in his or her bank records. Congress through a diluted process much influenced by the Department of Justice, generated the toothless and ineffective Financial Privacy Act of 1978 which provided neither for criminal penalties for offending police officers nor suppression of the evidence even for the most outrageous conduct of federal agents.[10]

In *Zurcher* v. *Stanford Daily,* 436 U.S. 547 (1978), the Supreme Court upheld a police requested search warrant for the offices of a student newspaper without any showing that a subpoena for the materials sought would be inadequate. Because of the pressure of the press and media interests, Congress again generated another political placebo known as the Privacy Protection Act of 1980.[11] Fortunately, this statute is circumscribed to protection of the press and academia, for Congress protected those First Amendment interest holders by denying them a cause of action against the individual officer. Congress, in essence, provided a tort action against the government, but relieved the individual officer of any liability. Congress was fully cognizant that it was overruling the decision of the Supreme Court in *Carlson* v. *Green,*

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[6] *Stone* v. *Powell,* 428 U.S. 465 (1976).

[7] The concept of "standing" to assert the rule has been confined to those who have an undeniable expectation of privacy in the thing searched or seized. *Rakas* v. *Illinois,* 439 U.S. 128 (1978) (being on the premises not sufficient); *United States* v. *Salvucci,* 488 U.S. 83 (1980); *Rawling* v. *Kentucky,* 448 U.S. 98 (1980) (person accused of possessing contraband did not have standing); *United States* v. *Payner,* 447 U.S. 727 (1980) (an egregious theft of a briefcase engineered by government agents did not warrant suppression because it was not the defendant's).

[8] In this term the prosecution sought and obtained certiorari in three search and seizure cases: *Florida* v. *Brady,* 31 Crim.L.Rep. 4062, 4064 (24 May 1982) ("open fields" doctrine); *United States* v. *Villamonte-Marquez,* (reasonable suspicion required for boarding ships on inland waters); and *United States* v. *Place,* 31 Crim.L.Rep. 4077 (7 June 1982) (two-hour detention of air passenger's luggage on reasonable suspicion improper). Four Justices must vote to grant certiorari. Three Justices dissented from a denial of certiorari in *Vasquez* v. *United States,* —— U.S. ——, 30 Crim.L.Rep. 4060 (2 November 1981), in which the petitioner sought to challenge a warrantless "security check" of his home for evidence when the petitioner had been arrested outside of his residence. Three Justices dissented from a denial of certiorari on the warrantless installation of electronic beepers. *Michael* v. *United States,* —— U.S. ——, 30 Crim.L.Rep. 4043 (2 November 1981). Two Justices dissented from a denial of certiorari to review "plain view" of documents found in a drawer in a search for chemicals. *Crouch* v. *United States,* —— U.S. ——, 30 Crim.L.Rep. 4043 (2 Novermber 1981).

[9] In 1977, Congress approved search warrants obtained over the telephone. Rule 41(c)(2), Fed.R.Crim.P.

[10] Pub. L. 95-630, 92 Stat. 3697 (10 Nov. 1978); 12 U.S.C. §§ 3401-3422.

[11] Pub. L. 96-440, 94 Stat. 1879 (13 Oct. 80); 42 U.S.C. §§ 2000aa-2000aa-12.

446 U.S. 14 (1980), so that the citizens not protected by the Financial Privacy Act of 1980 may still sue individual officers if their Fourth Amendment or fundamental privacy rights are violated.[12]

Within the last year, the Supreme Court continues its march to establish the supremacy of the police. Where lower state or federal reviewing courts have reversed criminal convictions because of the overreaching of the police, the Supreme Court has reversed and given their imprimatur to the police conduct. Congress should not be concerned that the Fourth Amendment is applied too much by the Supreme Court, but probably too little. Congress should not enter into a vacillating debate generating great inconsistency even with the Supreme Court. Last term in *Robbins* v. *California,* the Court, with Mr. Justice Stewart writing the plurality opinion in *Robbins* v. *California,* 435 U.S. 420 (1981), found the Fourth Amendment required a warrant to search an opaque bag in the luggage compartment of a station wagon. Mr. Justice Stewart retired, and 11 months after *Robbins,* Mr. Justice Stevens, writing for three other Justices in which two others concurred in *United States* v. *Ross,* reversed *Robbins.* Now once the police have probable cause to believe that contraband is concealed somewhere within an automobile, they may search in every nook and cranny and examine any container, thing, or document without a search warrant. Individual privacy, once there is the minimum factual showing to permit the reasonable police officer to believe there is "contraband" concealed in the vehicle, evaporates. Justice Marshall in his dissent used strong language:

"The majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself." 31 Crim.L.Rep. 3059 (1982).

An uninformed public believes that many guilty persons go free because of successful suppression motions, but knowledgeable persons know that few are actually granted because of judicial hostility to the Fourth Amendment. Respect for the Fourth Amendment and the privacy it was designed to protect is recognized by the public, and not all are happy with the ever-increasing judicial retrenchment of the Fourth Amendment. (See attached Appendix A, cartoon is Los Angeles Times dated 3 June 1982).

STATE RESPONSES TO FEDERAL LIMITATIONS

The states have not sunk to the level of protection provided by the Federal Constitution (the "how low can you go" approach), but within the ambit of our federal government, which recognizes an important role of the state governments with their respective constitutions in protecting the citizens, has articulated standards higher than the federal minimum.[13] Congress should provide deference to those evolving state standards and may wish to incorporate them as federal law.[14] The dissent in *United States* v. *Miller* noted that the majority conflicted with the California case of *Burrows* v. *Superior Court,* 529 P.2d 590 (Cal. 1974), which recognized the state citizen's right to financial privacy in his bank records. Thereafter, the California Legislature adopted the Right to Financial Privacy Act[15] The California statute expressly provides criminal penalties (a misdemeanor)[16] and the exclusion of evidence seized in violation of the statute.[17] In comparison, the federal Financial Privacy Act of 1978 provides for neither criminal penalties nor the exclusion of evidence. In *People* v. *Blair,* 602 P.2d 738 (Cal. 1979), California recognized privacy also in credit

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[12] See n.23, infra.

[13] See *Cooper* v. *California,* 386 U.S. 58, 62 (1967); *Sibron* v. *New York,* 392 U.S. 40, 60–61 (1968); *State* v. *Grijalva,* 533 P.2d 533 (Ariz. 1975); *People* v. *Brisendine,* 531 P.2d (Cal. 1975); *People* v. *Hoinville,* 533 P.2d 777 (Colo. 1976); *State* v. *Kaluna,* 520 P.2d 51 (Hawaii 1974) [state supreme court refused to be bound by *United States* v. *Robinson,* 414 U.S. 218 (1973), and *Gustafson* v. *Florida,* 414 U.S. 260 (1973)]; *State* v. *Opperman,* 247 N.W.2d 673 (S.D. 1976) (state supreme court differed with U.S. Supreme Court's holding in *South Dakota* v. *Opperman,* 428 U.S. 364 (1976), and held that the state constitution was violated even though U.S. Constitution was not); *State* v. *Sawyer,* 571 P.2d 1131 (Mont. 1977); *O'Connor* v. *Johnson,* 287 N.W.2d 400 (Minn. 1979) (search warrant for the premises of a non-suspect attorney's office held invalid, and the court rested its decision not only on the United States Constitution (Fourth Amendment) but also on the Minnesota Constitution).

[14] By analogy, Congress has established a national minimum wage, but the compensation for federal employees is substantially greater. Would Congress want to lower the national minimum to pay federal employees less? Congress, if intervention is necessary, should be shoring up the "constitutional floor" for federal courts instead of lowering it.

[15] Cal. Government Code §§ 7460–7493. See also, Ore. Rev. Stat. 192.590(5); and Nev. Rev. Stat. 239A.180 and 239A.190.

[16] Cal. Government Code § 7485.

[17] Cal. Government Code § 7489.

cards as well as in telephone records. The decision of the California Supreme Court rested upon California statute as well as Constitution[18] which precludes further review by the U.S. Supreme Court.[19] From 1914 to 1961, the U.S. Supreme Court was the ground cutter that convinced the states of both the efficacy and morality of the exclusionary rule. Many states had adopted it prior to the enforced requirement of *Mapp.* As the U.S. Supreme Court contracts and withers the scope of the exclusionary rule as a minimal due process standard, giving great deference to police action in criminal cases, the states in their historical role of protecting their own citizens have demanded greater scrutiny of police conduct and protection for citizens than commanded by the Federal Constitution. The states which are closer to the people are better able to develop a reasonable standard that could guide Congress in the adoption of a reasonable federal standard. The Supreme Court sets only the minimum standard, the same for both the federal courts. To seek less than the minimum destroys any semblance of protection of personal privacy for our society.

PURPOSES OF THE EXCLUSIONARY RULE

The characterization of the exclusionary rule as a judicially fashioned device to deter future unlawful police conduct does not adequately state its basis, but is only one limited objective of the rule. A complete review of judicial precedents offers sounder and more practical reasons beyond police deterrence, which is moral rather than actual. These judicially recognized purposes of the rule include:

A. *Self-executing rule of law.*—The exclusionary rule implements the Fourth Amendment. In *Weeks* v. *United States,* 232 U.S. 383 (1914), the Court held that if the protection of the citizen was not respected by declaring the evidence inadmissible the Fourth Amendment "might as well be stricken from the Constitution." 232 U.S. 383, 393. Justice Oliver Wendell Holmes, in rejecting evidence derived from an illegal search, said that to do otherwise "reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920).

B. *Judicial morality—Imperative of judicial integrity.*—The exclusionary rule insulates the judiciary from participation in violations of the Fourth Amendment. Again in *Weeks* the Court stated: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. 383, 394. Evidence is an integral part of the judicial proceeding, and a judge sworn to uphold the Constitution morally and legally ratifies the misconduct of the officers as his own by regularly using its fruits. Recently some judges by circular reasoning have criticized the inconsistencies of this rule because courts in the last 20 years have created exceptions to it (i.e. use of illegal evidence in the grand jury, limited standing). Modern judicial analysis has given more weight to the practical needs of law enforcement without a full appreciation of the surrender of judicial neutrality. The preference being given to the needs of the Executive is bound to lessen the independence of the Judiciary.

C. *Fundamental protection of right of privacy.*—The exclusionary rule generally protects the right of privacy of all citizens, accused or not. The primary object of the Fourth Amendment is the right of privacy—"indefeasible right of personal liberty and private property," quoted from *Entick* v. *Carrington,* and cited in *Weeks* v. *United States,* 232 U.S. 383, 391. The worth and dignity of each citizen must be scrupulously respected by government agents. Each citizen has some zone of personal control beyond overreaching Government. Governmental acknowledgment of this personal protection makes the citizen equal in right to the state. To deny the right of privacy makes the citizen the subordinate of the state. The Fourth Amendment protects people, not places.[20] The criminal trial is a social focal point for all to see if Government is restrained by the Constitution. What happens to the accused is a lesson for all of us.

D. *Deterrence of unlawful police conduct.*—The cliche most offered is that of the prospective deterrence of law enforcement officers, but this is an oversimplification. It is an obvious extension of the rule that no person, even government officer, is

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[18] The California Constitution recognizes the fundamental right of privacy (Article I, Section 1).

[19] The U.S. Supreme Court will not review a state court decision which is founded upon state law. This has been called the "independent state grounds" rule. Therefore, the state courts can give different interpretations to similarly worded constitutional provisions which are not later subject to federal review. Stein and Gressman, "Supreme Court Practices," 230-232 (5th ed. 1978).

[20] *Katz* v. *United States,* 398 U.S. 347, 351 (1967); *Ybarra* v. *Illinois,* 444 U.S. 85 (1979); *Rawlings* v. *Kentucky,* 448 U.S. 98 (1980).

above the law. The exclusionary rule was forged in response to cumulative police disrespect of the constitutional limitations on their power. Their repeated breaches of the constitutional right of privacy could not be treated as mere "technical" violations. Such conduct was not adequately sanctioned by pious ineffective judicial pronouncements that the police conduct was wrong but the evidence admissible. By the exclusionary rule the courts tell the police to "shape up" and abandon their immoral practice of using any means to obtain a criminal conviction. Judicial review in the context of a criminal case may disapprove police misconduct but not punish it. The delicate inter-governmental balance, the hallowed concept of checks and balances, permits the courts to ask for police compliance with the Constitution but does not force it. Courts are loathe to find governmental misconduct save in rare instances. If the police are concerned with successful prosecutions—that they perceive themselves as enforcers of the law, including the Constitution, then the infrequent and rare suppression of evidence is a subdued exhortation to rise to a level of professionalism expected of competent officers. If this atypical mild chastisement is abolished, the police then know that their conduct is above scrutiny, for Congressional abolition of the exclusionary rule is sub silentio approval of their pragmatic amoral principle: Do whatever is necessary to put the "bad guys" in jail. More politely this is called "the end justifies the means." The courts as the final protectors of the Constitution have the duty to motivate police respect for the Fourth Amendment.

E. *Public respect for Government.*—The exclusionary rule is designed to ensure public confidence that government officials do obey the commands of the Constitution. The public must believe that the police are subordinate to the law and that more than lip service is paid to the Constitution. The ability of the police to function is controlled by community respect. If the police do not respect the law, the public will not respect the police. The oft-quoted statement of Justice Brandeis in his dissent in *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928), expresses this important purpose:

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

Those seeking to eliminate the personal accountability of the officer for unconstitutional violations are restructuring our society by placing the policemen "above the law." To insulate erring policemen from personal accountability in the courts runs counter to our system of checks and balances—and diffusion of power.

ALTERNATIVES TO THE EXCLUSIONARY RULE

Many alternatives to the exclusionary rule already exist, but none have been effective. These theoretical remedies have produced no demonstrable effect on curbing unlawful police conduct. Congress, however, now proposes to immunize individual federal agents from their misconduct. Because the Federal Government has provided substantial funds to retain private attorneys for federal officers charged with illegal searches, the Government now wishes to insulate itself (permit only limited actions against the United States for money damages to save the cost of attorneys fees and limit awards of damages) and immunize the officers. The removal of the token redress now available, is offered in the guise of an "alternative" to the exclusionary rule.

The theoretical remedies for illegal searches other than the exclusionary rule include:

A. *Criminal actions.*—Both state and federal authorities have statutes which provide substantial criminal sanctions, including long-term confinement, for those who violate the civil rights of persons.[21] The enforcement of these statutory penalties against law enforcement officers are rare, for prosecutors, dependent upon the investigative work of law enforcement officers, would have to suffer the alienation of such a criminal action. When criminal prosecutions have been instituted for egregious wrongdoing on the part of federal agents, they have not been successful. Even the prosecutors who try such cases are aware that a conviction is most difficult to obtain. In November 1980, a federal prosecutor in a criminal action against former

[21] Cf., 18 U.S.C. §§ 241, 242.

FBI officials in closing argument asked the jury to let the Constitution ring out loud and clear, and the agents were convicted. In early 1981, these two former FBI officials who received only a nominal fine, were pardoned by President Reagan.[22]

B. *Criminal contempt.*—Dean Wigmore in his treaties on evidence [Wigmore, 8 Evidence § 2184 (3d ed. 1940)] suggested a rather oversimplified solution. In essence, if the officer violated the constitutional rights of the defendant in seizing evidence, the defendant should be found guilty, and the court should then impose summary contempt and sentence the officer to 30 days in jail "for his contempt of the Constitution." Although the judge might be able to theoretically impose such sanctions, judicial courageousness has not yet reached that level in the enthusiastic enforcement of the Fourth Amendment. Although the desire exists to punish the defendant, no such equal desire exists to punish the law enforcement officer for constitutional malfeasance.

C. *Internal discipline by police administrative authorities.*—The police often suggest that police review boards (with all police management personnel) and other administrative review mechanisms within the law enforcement apparatus may take appropriate action against the officer who overreaches and violates the constitutional prohibition against unlawful searches and seizures. The obvious conflict of the police authority encouraging the officers to make apprehensions of violators while at the same time circumscribing their zealousness is almost unresolvable. Too often the police officers conducting the review of such alleged disciplinary wrongdoings might implicitly and understandably apply the adage of St. Paul that "There but for the grace of God go I." One federal legislative proposal would allow the aggrieved person to participate in the internal administrative proceeding, but although an improvement, it still does not indicate the outcome would be any different. Chicago Police Detective Jack Muller got into trouble for his comments about the Chicago Police Department's Internal Inspection Division (IID). He said: "The IID is like a great big washing machine. Everything they put into it comes out clean."[23]

D. *Civil actions.*—State and federal statutes, as well as common law remedies, exist to prosecute the officer for violation of civil or constitutional rights. Federal law permits an action for money damages against a state police officer for an unlawful arrest and search (42 U.S.C. § 1983). In *Monroe* v. *Pape,* 365 U.S. 157 (1961), the police officer claimed his alleged wrongful action was not "under color of law" and not covered by 42 U.S.C. § 1983, the Ku Klux Klan Act of 1871 protecting civil rights of citizens. This argument was rejected. Since 1971, a similar action for money damages against federal agents may be brought.[24] To enforce these actions, attorneys are essential, but few attorneys would take such cases on the basis of contingent fees. The costs in such litigation are substantial, for the law enforcement officers will often have representation provided at public expense. When sued, government with almost inexhaustible resources may make the litigation most onerous, protracted, and costly. Knowledgeable witnesses are reluctant to testify against police officers, and juries are averse to find liability or award damages, where the plaintiff has been found guilty of some crime.

E. *Action against the Government.*—In the past, sovereign immunity was available to the government who employed the wrongdoing officer. As a result of the Collinsville, Illinois, drug raids by federal law enforcement of innocent persons' houses, the Federal Tort Claims Act was amended to provide an action for money damages against the United States "with regard to acts or omissions of investigative law enforcement officers of the United States Government . . . [for] any claim arising, on or after the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution."[25] For the offending state police officer, an action against the municipality for a violation of federal civil rights was recently made possible.[26] The municipality or state may not assert the

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[22] *United States* v. *Mark Felt and Edward Miller,* Crim. No. 78-179 (D.D.C.), in which both defendants were charged with civil rights violations, 18 U.S.C. § 241, and found guilty on 6 November 1980. On 15 December 1980, each was sentenced, and the case was appealed. On 26 March 1981, President Reagan pardoned each, but the criminal appeal is still pending because the outcome may affect civil liability.

[23] *Muller* v. *Conlisk,* 429 F.2d 901, 902 (7th Cir. 1970).

[24] *Bivens* v. *Six Unnamed Federal Agents,* 403 U.S. 388 (1971). The proposed legislation (S. 751) would not affect civil rights suits against state law enforcement officers, but only federal officers.

[25] Pub. L. 93-253; 28 U.S.C. § 2680(h).

[26] *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978), overruling to that extent *Monroe* v. *Pape,* 365 U.S. 157 (1961), which had insulated the municipal government.

good faith of its officers as a defense, but that defense may still be asserted by the individual officer.[27] Legislative actions, such as S. 751, thought to expand privacy rights may actually contract the remedy. Congress to protect news and school rooms from searches passed the Privacy Protection Act of 1980[28] which erased the right to jury trial against an offending federal agent.[29]

Until remedies are made viable, they cannot be considered efficacious alternatives to the exclusionary rule. Those who strongly encourage the use of alternatives forget that they are now suggesting a procedure that will proliferate controversy with the institution of administrative and other civil litigation lacking both the ultimate fairness and quick efficiency of the immediate relief granted in a criminal case. The eroded and limited exclusionary rule, under the Supreme Court's recent interpretations which give much deference to the difficulties of the line police officer, is applied by a trial judiciary sensitive to the needs of law enforcement with the result that relief is rarely granted. Those offering substitutes seek to provide no remedy at all.

THE ADVERSARY SYSTEM AND THE RULES OF EVIDENCE

Because of an alleged imbalance or disadvantage, law enforcement advocates seek novel constitutional amendments that not only reflect a misapprehension of the problem presented, but also challenge and undermine the very nature of the adversary system. In a criminal proceeding, both parties are considered as equal, but the resources and predominance of the Government far exceed that of any individual criminal defendant, most of whom cannot afford an attorney. The courts, to ensure a fair and just disposition of the case, must enforce rules of law that regulate the admissibility and inadmissibility of evidence.

Federal trial courts,[30] under the principles of evidence formulated by a Judicial Conference Committee and ratified after much revision by Congress in 1975, do not accept all evidence ("the truth"). Policy reasons limit self-evident truth. The individual has certain inalienable rights, express and implied in the Constitution, that must be respected by the government. Ours is not a totalitarian state. For example, should a truthful confession obtained by torture be admissible?[31]

Hearsay evidence, although its accuracy might not be challenged, is inadmissible because of the defendant's right to confront his accusers and society's interest in obtaining information firsthand. The rules need an enforcement mechanism, and one of the basics is the exclusion of evidence. Exclusion, may be derived from constitutional provision, a statute, or even a court rule, but most often it depends upon the discretion of the trial judge in applying the rule to the facts. Under the Congressionally approved Rules of Evidence, the district judge has broad discretion to exclude: (1) improper confessions [Rule 104(c)], (2) irrelevant evidence and evidence contrary to the Constitution, statute, or court rule (Rule 402), (3) probative evidence outweighed by prejudice (Rule 403), (4) crimes or misconduct offered as proof of bad character [Rule 404(b)], (5) admissions made during plea negotiations (Rule 410), (6) past sexual behavior of alleged victim (Rule 412), (7) privileged statements (Rule 501), (8) testimony of incompetent witnesses (Rule 601), (9) prior convictions of defendant or witness (Rule 609), (10) hearsay (Rule 802), and (11) documentation without authentication (Rule 901).

On this and many other evidentiary issues the federal trial judge, often unlike his state counterpart, is given broad discretion. Federal appellate courts give great deference to the judge who held the hearing, and if error is found, it will often be treated as harmless. With such broad guidelines on the admission of evidence generally, it would seem anomalous to accord special treatment to illegally seized evidence.

Congressional intervention comes across more as political posturing to balance the scales of justice to favor the police. The federal courts may only influence those brought before them. The misinformed public does not understand that almost 90 percent of the dispositions in federal court are on pleas of guilty waiving any evi-

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[27] *Owen* v. *City of Independence,* 445 U.S. 622 (1980).

[28] Pub. L. 96-440, 94 Stat. 1879 (13 Oct. 80); 42 U.S.C. § 2000aa.

[29] In *Carlson* v. *Green,* 446 U.S. 14 (1980), in addition to the Federal Tort Claims Act cause of action (tried by a judge alone), the plaintiff in a *Bivens* suit against the federal officer directly was entitled to trial by jury. Punitive damages are available in the suit against the individual, but not against the government.

[30] Congress may "constitute tribunals inferior to the Supreme Court" (U.S. Constitution, art. I, sec. 8, cl. 9), but it should not use that as a basis to overturn the Fourth Amendment as interpreted by the Supreme Court.

[31] *Brown* v. *Mississippi,* 297 U.S. 278 (1936) (a confession obtained by torture is not admissible because of a violation of fundamental due process).

dentiary challenge. When those charged are brought to court, the rules of evidence, including the exclusionary rule, come into play to achieve a fair and orderly presentation of the facts in a lawsuit between the Government and the accused. This rule has no connection with police apprehensions or the reasons for crime.

More public education about what the federal criminal justice system does and can do is a goal more in consonance with our form of government. The courts are easy targets, but most experienced defense lawyers would, if asked, contend that the majority of federal judges are pro-prosecution because of their institutional role as a government functionary. Those rulings excluding evidence are in the main for egregious misconduct. Because of the very limited judicial resources and a large criminal caseload, a symbiotic relationship exists between the judge and the prosecutor, even though judicial independence requires detachment and objectivity from the charging process. Often judges are heard speaking more of the number of cases disposed as a measure of performance rather than the quality of justice achieved between the parties.

The federal police advocates claimed many went "unwhipped of justice" because of this rule. Senator Kennedy, then Chairman of the U.S. Senate Judiciary Committee, requested a survey on the impact of the exclusionary rule in federal criminal cases. The results were startling. From the period 1 July through 31 August 1978, in 38 U.S. Attorney's Offices, 2,804 defendant cases were evaluated. Of the filed motions to suppress evidence, over one-half dealt with Fourth Amendment issues.[32] Of the 2,804 defendant cases, only 1.3% resulted in exclusion of evidence. Of those cases where the motion to suppress was granted in total or in part, 50% of the defendants were still convicted.[33]

FEDERAL CRIMINAL CASELOAD

The two Senate Bills (S. 101 and S. 751) address the exclusionary rule in the context of federal criminal proceedings. For the 12-month period ending 30 June 1981, the 95 district courts commenced 30,355 criminal cases. Federal cases do not include a great number of violent felonies, because such offenses are the province of the states who constitutionally are the repositories of the police power (United States Constitution, Tenth Amendment). These district court criminal cases included 20,009 felonies:[34]

Nature of offense	Number	Percentage of felony total
Homicide	184	0.9
Robbery	415	2.1
Assault	528	2.6
Burglary	119	0.6
Larceny	1,845	9.2
Embezzlement	1,484	7.4
Fraud	3,490	17.4
Auto theft	297	1.5
Forgery and counterfeiting	1,771	8.9
Drug abuse:		
Marihuana	768	3.8
Narcotics	1,695	8.5
Controlled substances	694	3.5
Immigration	1,857	9.3
Weapons and firearms	1,257	6.3
All others	3,605	18.0
Total	20,009	100.0

[32] Others dealt with confessions, photographic and lineup identifications, and electronic surveillance.

[33] "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," Comptroller General Report, 19 April 1979. Also, .4 percent of the cases in which the prosecution declined to go forward were declined due to Fourth Amendment search and seizure problems.

[34] "Annual Report of the Director of the Administrative Office of the United States Courts," Table D-3, A58-59 (1981) (total does not come up to 100 percent due to rounding). This records system does not include petty offenses (maximum penalty 6 months) filed before the magistrate. Immigration and traffic offenses on a federal enclave would probably be the largest categories of criminal offenses, but because these cases before the magistrates are not included.

The violent crimes of public concern are few in federal courts and do not justify Congressional override in view of such few suppressions of evidence. The state legislatures and courts are best able to deal with the state criminal justice system. Congress should be honest with the public that such issues are best resolved within the domain of the state. Our federalism works best without Congressional overreaching.

PROPOSED LEGISLATION

S. 101 (DeConcini) is a not-so-subtle attempt through erosion to eliminate the exclusionary rule. This bill, with tongue-in-cheek recognition of the exclusionary rule, would excuse all violations unless they were "intentional or substantial." Most have recognized this as a flank attack on the exclusionary rule by creating the "good faith" exception in which police ignorance would rise to the level of virtue. S. 751 (Hatch-Thurmond) is a frontal assault seeking straightforward abolition of the exclusionary rule (proposing a federal statute, 18 U.S.C. § 3501) that would permit admissibility of evidence even if obtained in violation of the Fourth Amendment.[35] S. 751 also offers a "new" tort remedy that would preclude punitive damages for anyone convicted of anything (i.e. resisting arrest), but in any event there is a maximum of $25,000. This statutory tort remedy in effect limits the statutory and common law remedies now available, and under this "new statutory cause of action" removes the objective determination of a police wrong from the jury to a judge.[36] Administrative discipline for constitutional wrongs by police officers adds nothing. It says nothing more to statutorily sanctify an already existing biased and atrophied police management tool. The provision for attorneys fees, if a party prevails, does little to encourage attorneys to accept these cases that would be cited solely by judges when there will be controverted evidence presented both by the plaintiff and the defendant federal officers.

THE GOOD FAITH EXCEPTION

In *Michigan* v. *DeFillippo,* 443 U.S. 31 (1979), the Supreme Court recognized a limited "good faith" exception for police officers. The defendant was arrested pursuant to a Constitutionally defective Detroit ordinance which allowed police officers to stop and detain those who refused to give identification. The police made the arrest of the defendant in good faith reliance on the defective but seemingly valid ordinance, and the evidence seized as a product of that arrest was admissible. The decision in *United States* v. *Williams,* 622 F. 2d 830 (5th Cir. 1980) (en banc), cert. denied, 101 S. Ct. 946 (1981), was obiter dicta, for the court found the suspect guilty of criminal contempt in being in a place not authorized by her appeal bond. At the time he arrested her, the police officer thought the defendant was guilty of "bail jumping" which was not technically correct.

There is a quantum leap between the *DeFillippo* case and the *Williams* case. In *DeFillippo,* the legislative body promulgated an ordinance that at the time of the arrest had not been judicially determined to be Constitutionally defective. The belief of the individual officer is not relevant to the existence of the ordinance, but in *Williams* the justification for arrest turned on the officer's belief that the conduct of the suspect was criminal. If a federal officer believed that a person committed the offense of hindering law enforcement (a non-existent federal offense) would the arrest have been reasonable? If the officer honestly believed that an individual committed the offense, but was in error as to an essential element, would that justify the unlawful arrest?

Arrests occur on the street; evidentiary hearings take place in the courtroom. The factual reconstruction of events depends upon the accuracy and authenticity of the testimony presented, and often 20–20 hindsight influences reconstruction. Clear-cut objective standards are necessary to test the propriety of the police officer's conduct, and the subjective "good faith" test of the police officer nullifies any judicial scrutiny. The court will be forced to accept the state of mind of the officer, right or wrong, ignorant or intelligent, precipitous or cautious. The danger of the "good

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[35] The subordination of the Constitution to statute, making the Fourth Amendment inferior to a Congressional statute, has already been achieved by the Supreme Court. Evidence seized in violation of the federal wiretap laws is not admissible before a grand jury, [*Gelbard* v. *United States,* 408 U.S. 41 (1972)], but evidence seized in violation of the Fourth Amendment is [*United States* v. *Calandra,* 414 U.S. 338 (1974)].

[36] Under existing case law, *Carlson* v. *Green,* 446 U.S. 14 (1980), the aggrieved party has both a cause of action against the Government and the individual officer. There is no limit on the damages that may be obtained against the Government, and against the individual officer he has a right to trial by jury and may seek punitive damages.

faith" test to determine the propriety of the arrest in a criminal prosecution has been severely criticized.[37]

Justice Potter Stewart, recently retired from the Supreme Court, who did not join in the opinion in *Mapp* v. *Ohio,* which applied the exclusionary rule to the states, commented:

"The criticism is best perhaps summed up in Justice Cardozo's aphorism that 'the constable blundered so the criminal goes free.' But those who support it say that it is the only effectively available way to enforce the provisions of the Fourth and Fourteenth Amendments, and to date that has been the view espoused by the Supreme Court of the United States. What its future may be, I don't know, but it seems to me that if one modifies the exclusionary rule and moves to this sort of good faith inquiry that other difficulties will arise which, foreseeably, will be just as difficult issues as are present now. What law enforcement officer is ever going to say that he deliberately and knowingly violated the Fourth and Fourteenth Amendments? So the test will have to be how egregious was the violation, and that in the end becomes something of a subjective test." [38]

In the recent pro-police decision in *United States* v. *Ross,* supra, Justice Stevens indicates that the Court's endorsement of warrantless automobile searches by police does not signal an adoption of the "good faith" test by police officers. He stated:

"Moreover, the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. . . . 'As we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the [officer], which in the judgment of the court would make his faith reasonable'." 31 Crim.L.Rep. 3051, 3054.

A noted authority on search and seizure, Wayne R. LaFave,[39] in a recent article [40] outlined four adverse consequences if "good faith" of the policemen became the test for lawful searches.

1. The adoption of a "good faith" exception would "stop dead in its tracks" judicial development of Fourth Amendment rights. A court would have to deny a motion to suppress unless it could cite a specific precedent with identical facts. Search and seizures questions often turn on facts, and the good faith rule would freeze review to that which was already decided.

2. The adoption of the "good faith" exception would impose on suppression judges the intolerable burden of making exceedingly difficult decisions on a regular basis. The court would have to determine the knowledge of the police officers as well as their subjective state of mind. Professor LaFave refers to Winston Churchill's phrase of "terminological inexactitude."

3. "I believe that adoption of the 'good faith' exception would likely result in a distinct pro-police (or, if you prefer, anti-Fourth Amendment) bias in suppression rulings." Considerable judicial hostility exists to the exclusionary rule, and local trial judges are currently loathe to make exclusionary rulings and inclined to misconstrue the Fourth Amendment and fudge the standards of probable cause.

4. "I believe admission of illegally seized evidence under a 'good faith' exception would be perceived or treated by the police as a license to engage in the same conduct in the future. That is, the risk in such tampering with the exclusionary rule 'is that police officers may feel that they have been unleashed' and consequently govern their future conduct by what passed the good faith test in court rather than on the traditional fourth amendment standards of probable cause, exigent circumstances, and the like."

Professor LaFave points out that even opponents to the exclusionary rule have doubts about the propriety of the "good faith" exception:

"Professor Steven Schlesinger, a staunch opponent of the exclusionary rule, recently concluded that the 'good faith' proposal 'provides little or no deterrence for violations deemed by the courts to be in good faith' because it fosters 'a careless attitude toward detail on the part of law enforcement officials' and encourages 'police to see what can be gotten away with before the courts draw the line on what is an intentional violation.' " [41]

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[37] Mertens and Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L. Jour. 365 (1981); Dejong, "The emerging good faith exception to the exclusionary rule," 57 Notre Dame Lawyer 112 (1981).

[38] 14 "The Third Branch" (January 1982).

[39] Author of the excellent three volume work, "Search and Seizure: A Treatise on the Fourth Amendment" (1978).

[40] "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Line' and 'Good Faith,' " 43 U. Pitt. L. Rev. 307, 354-59 (1982).

[41] Ibid., 358.

THE DEFENDANT'S PERSPECTIVE: POLICE PERJURY

Few motions to suppress are granted in federal court, but the defense bar does not generally accept punctilious conformity with constitutional requirements as the justifications for infrequent application of the exclusionary rule. Experienced police officers know what the legal requirements are and how they may be satisfied. A search warrant is not necessary if there are "exigent circumstances" or if the suspect "consents." If the officer is making an arrest and observes the contraband "in plain view" then he has a right to seize it.

Although courts hear regularly how defendants request the officers to open the trunk of their cars where the contraband is found, the defendant often controverts this statement. To challenge the officer, the defendant must first testify. Although testimony given by a defendant at a suppression hearing cannot be used by the government in their case in chief, it may be used for purposes of impeachment. Defendants are reluctant to willingly incriminate themselves. Rarely will a defendant testify at a motion to suppress hearing because the wide-ranging inquiry at this preliminary hearing to determine the admissibility of evidence could severely undermine a valid defense. The audacious defendant who will testify participates in a credibility contest that he never wins. The judge, when having to choose between the testimony of "unbiased" law enforcement officer and the "self-serving" remarks of the defendant, will almost always believe the officer.

Lawyers and police officers familiar with the federal criminal justice system know this, but the defendant, especially those unfamiliar with the workings of the system, are outraged by the distortion of the truth. Once the trial judge makes a factual finding as to credibility it is practically unreviewable, for it was only the trial judge who heard the testimony and weighed the demeanor of the witnesses. Even as to issues of law and fact, the trial judge may be reversed only if the ruling made in the district court was held "clearly erroneous." In essence, defense lawyers present arguments in which the police version of the events is accepted as true. If reviewing courts find a violation of the Fourth Amendment, many believe that police conduct does not change but only their subsequent testimony.

If police are expected to use certain formalistic language, then can it be called "perjury" if they feel that the system, by custom and tradition, expects such testimony? When a court of appeals judge, Chief Justice Burger stated: "It would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion." [42] In order to justify a search, police officer testimony may have degenerated to the level of defendants of old sentenced to death who would repeat a few words in Latin, part of a prayer, so as to gain the benefit of clergy." Although both acted for good ends—one to justify a search and the other to avoid the death penalty, there was something unethical or wrong about a system that permits repeated deviations from the truth. Much of the police concern for the abolition of the exclusionary rule is not its application but an honest desire to avoid a hypocritical justification of their conduct in court.

INTERIM REFORM PROPOSALS

A. *Appointment of counsel.*—Before Congress directly (S. 751) or indirectly (S. 101) abolishes the Fourth Amendment exclusionary rule, it should experiment with additional legislative devices to honestly implement civil remedies that would be available to any citizen, accused or not.

In the same fashion that attorneys may be appointed by the court to pursue civil rights discrimination suits [43] similar legislation could provide for the appointment of counsel to represent a person aggrieved by a search by a federal officer. Such a provision might read:

"Any person aggrieved by an unlawful search or arrest by a federal [44] officer may apply to the district court for the appointment of counsel to pursue any civil or administrative remedies on behalf of that person. Appointment is discretionary with the district court or the United States magistrate, and counsel will be compensated at the same rates available for compensation under the Criminal Justice Act (18 U.S.C. § 3006A). If the person prevails in the administrative or civil proceeding and

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[42] *Bush* v. *United States,* 375 F. 2d, 602, 604 (D.C. Cir. 1967). See also Sevilla, "The Exclusionary Rule and Police Perjury," 11 San Diego L. Rev. 839 (1974).

[43] 42 U.S.C §2000e–5(f)(1)(b). See also *Bradshaw* v. *Zoological Soc. of San Diego,* 662 F. 2d 1301 (1981).

[44] After experience was gained with respect to federal officers, the provision for counsel could be extended to improper searches by state officers. Cf. 42 U.S. § 1983.

obtains, as a part of the judgment or award, attorney's fees, those fees would be used to reduce the funds paid to counsel pursuant to this section."

This addition could be made either to the Criminal Justice Act (18 U.S.C. § 3006A) or to the Civil Rights Attorney Fees Awards Act (42 U.S.C. § 1988).[45]

B. *Special prosecutor.*—Federal prosecutors with some difficulties can institute federal criminal proceedings against state police officers who violate citizens' constitutional rights such as engaging in unlawful arrests or searches.[46] The difficulties are much greater in instituting criminal proceedings against federal law enforcement officers working closely with his office. This dependent relationship compromises the objectivity necessary to exercise the broad discretion in initiating such prosecutions. The legislation authorizing a special prosecutor [47] should be expanded to permit a district court upon a showing of reasonable belief that an officer committed an illegal search, to appoint an attorney as a special prosecutor with the same authority as a U.S. Attorney to determine if a case should be presented to a grand jury. If the grand jury returned an indictment, then the special prosecutor should take the case to trial. A federal defender office might be considered for that role because of its own inherent investigation capability as well as its skill in handling federal criminal cases.[48] Within the existing framework the federal system could provide for reasonable checks and balances to ensure there is serious scrutiny of alleged police violations of the Constitution.

C. *Local review board.*—Rather than a Washington-directed review procedure administered within the Department of Justice, Congress could establish local review boards for each of the 94 federal districts. Citizens, not necessarily lawyers, representing the community, could serve to hear alleged violations by federal officers with the authority to make formal censures and recommendations for suspension, removal, or other personnel actions for offending officers. The federal government tends to bring all questions to the capitol, but the greatest information as well as those in the greatest need of redress are located in the district. The federal government should fashion some administrative devices to provide outside comment on the excesses of federal law enforcement officers.

CONCLUSION

President Reagan has referred to the distinguishing feature between our form of government and that of the Soviets—the principle of morality—that the end does not justify the means. The government operates through its police agencies, and now federal law enforcement agencies take on monolithic proportions. Each officer must feel a personal sense of accountability and the oath of office to support the Constitution must be fairly enforced. Federal law enforcement should enforce all the laws including the Fourth Amendment. The Supreme Court has been both sensitive and responsive to the needs of law enforcement, and has modified, restricted, and reduced the influence of the exclusionary rule, but the proposed legislation by Congress is little less than nullification. Senator Kennedy, as an informed and responsible statesman, had asked for an empirical survey to determine the need for such revolutionary legislation, but the need was not established. Before the legislation is further pushed, great care should be taken and a more comprehensive set of surveys commissioned in several districts, both large and small, to determine how many motions to suppress evidence for illegal searches are actually granted. Our estimate is that there would be few.

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[45] In those districts where there is a federal defender, the federal defender may, consistent with the primary commitment under the Criminal Justice Act, serve as a central repository on reoccurring violations. The legislation could place the responsibility for evaluating the case and assigning counsel to the federal defender rather than the court or it could permit an interim investigation by the federal defender and then a nunc pro tunc ratification by the court similar to the Criminal Justice Act. This provision does not make the investigation or appointment of counsel depend upon financial ability to employ counsel, for the wrong done by government officers might not justify the substantial expenditures for counsel, and therefore economically inhibit these suits where there was actual misconduct. In the same fashion in which an accused in the military can obtain skilled and legally qualified military counsel, persons injured or abused by federal officers should have similar access without a showing of impecuniosity. 10 U.S.C. § 827. If the individual could obtain private counsel, he would be encouraged to do so.

[46] See *Who is Guarding the Guardians? A Report on Police Practices* (Commission on Civil Rights, 1981).

[47] Post-Watergate legislation authorized a procedure for the appointment of a special prosecutor for criminal prosecution of high-level official misconduct. 28 U.S.C. §§ 591, et seq.

[48] In Florida, the public defender of Miami (Dade County) was made a special prosecutor to investigate and prosecute official corruption occurring in another county.

The public is frustrated with the crime problem, but the fundamental precepts upon which this government is founded should not be so easily disregarded. Almost 100 years ago in *Boyd* v. *United States,* 116 U.S. 616, 635 (1886), Justice Bradley explained the duty of judges and legislators to conscientiously uphold the Constitution:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."* (Emphasis added).

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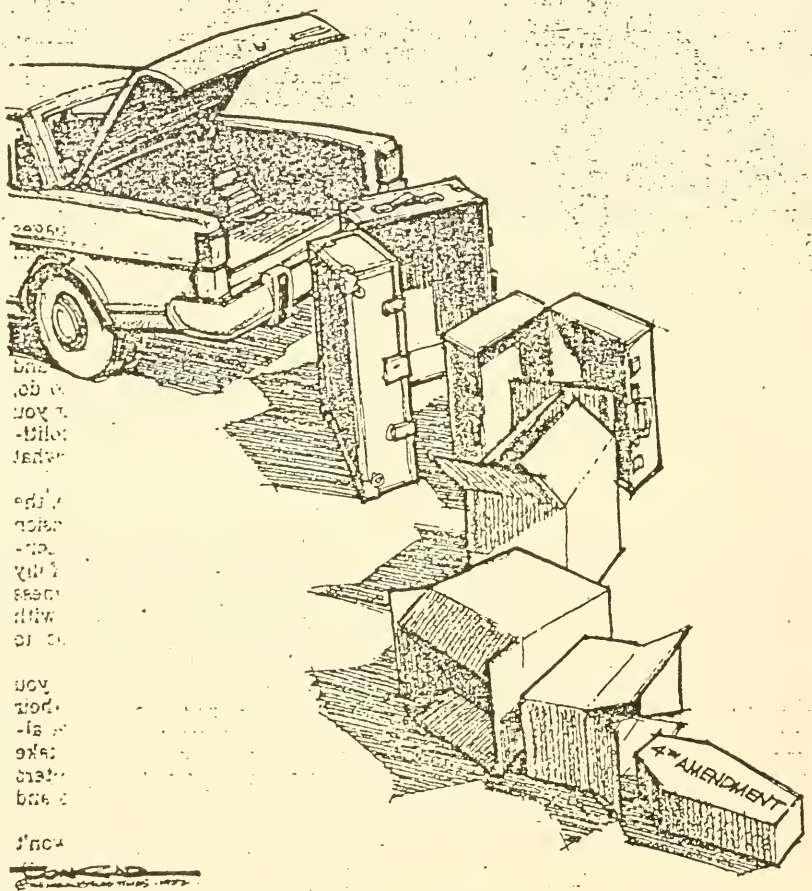

Supreme Court broadens police powers to search autos.—News item

Mr. CONYERS. The subcommittee stands adjourned.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned, subject to call of the Chair.]

OPERATION OF THE EXCLUSIONARY RULE

THURSDAY, DECEMBER 2, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Sensenbrenner, McCollum, and Shaw.

Staff present: Thomas W. Hutchison, counsel; Michael E. Ward, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. CONYERS. The subcommittee will come to order.

I ask unanimous consent that the hearing may be covered in whole or in part by television broadcast, radio broadcast, still photography or any other methods. Without objection, so ordered.

Today the Criminal Justice Subcommittee meets to hear testimony regarding the exclusionary rule as a mechanism to enforce the fourth amendment's protection against unreasonable searches and seizures.

This rule has been the object of increasing criticism. One court has indicated that the rule should not apply in cases when a police officer has acted in reasonably good faith. The administration has recommended that we modify the rule rather severely. The Supreme Court has ordered for reargument a case that specifically addresses the issue of the good faith exception.

The questions that concern this committee, among others, are whether we are now moving against the rule or against the fourth amendment itself.

We are very pleased to call as our first witness Prof. Silas Wasserstrom of Georgetown University Law Center, former Chief of the Appellate Division of the Public Defender Service in the District of Columbia, author and lecturer. We are very pleased to have Professor Wasserstrom here today. We will incorporate his law review article into the record and allow him to begin his discussion.

TESTIMONY OF SILAS WASSERSTROM, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. WASSERSTROM. Thank you.

Mr. Chairman, as you mentioned in your introductory remarks, the Supreme Court just 3 days ago ordered reargument in the case of *Gates* v. *Illinois,* and asked the parties to address an issue which

they originally had failed to raise in the Supreme Court. The Court asked them to address the issue of whether or not evidence seized by the police in the reasonable belief that their actions where lawful under the fourth amendment should be admissible in a criminal trial even if the judge decides that the police acted unlawfully. That is, the Court has asked the parties to address the question of whether there should be some sort of reasonable good faith exception to the exclusionary rule. This sort of exception is what is proposed by most of the pending bills.

It seems reasonably clear to me that if the Supreme Court were to adopt some sort of good faith exception, then any objections to such a rule as unconstitutional, which is the sort of objection that some of the witnesses I think you heard have made, would be beside the point. And it might be that, should the Court sanction such an exception, its decision would render the proposed legislation superfluous, although Congress would certainly be free to retain, by statute, an exclusionary rule for even good-faith constitutional violations.

I cannot predict what precisely the Supreme Court will do in *Gates*. The fact that they ordered reargument certainly suggests that at least some of the members of the Court, probably a majority, are seriously interested in adopting some form of good faith exception to the exclusionary rule.

Mr. CONYERS. Excuse me. The Court has continually lambasted the exclusionary rule, and it seems to me there has been an increasing amount of comment about it that I think should give a number of people cause for some concern.

Mr. WASSERSTROM. I think that if you had asked in 1976 whether the exclusionary rule was likely to survive at all, most observers would have said probably not. What has happened since then, though, is that the Court has reaffirmed the rule at least as an abstract principle, though at the same time it has consistently nibbled away at the edges of it and ruled that, in particular contexts, the rule shouldn't be applied. I would not be surprised to see the Court extend that process of erosion one giant step further by adopting a good faith exception which, it seems to me, would far more substantially undetermine effective enforcement of the fourth amendment than anything the Court has done so far.

Mr. CONYERS. Can everybody hear the witness? The answer is no, sir. Pull your mike up closer to you. It is a contact mike, so you really have to get it up close to you.

Mr. WASSERSTROM. Is that better?

Mr. CONYERS. I can't tell. I can hear you, but it is a matter of going through the room. The answer is yes.

Mr. WASSERSTROM. To just repeat my last comment, it seems to me that if the Supreme Court were to adopt a good faith exception, at least a broad version of a good faith exception, it would constitute a very substantial inroad on the exclusionary rule, far more substantial than those resulting from any of the other decisions which the Court has rendered in recent years which have also, to some extent, undercut application of the exclusionary rule.

It is possible, and it seems to me not unlikely, that the Supreme Court will adopt a fairly limited version of the good faith exception at issue in *Gates*. *Gates* itself involves a search conducted pursuant

to a warrant issued by a magistrate. After the warrant was issued and the police officers conducted the search pursuant to it, the Illinois courts decided that there was an insufficient basis for the issuance of the warrant and that the magistrate should not have issued it. It seems to me that the Court may simply adopt the version of the good faith exception limited to cases where the police are acting pursuant to a warrant issued by a magistrate.

A result of that sort would, at least superficially, be consistent with the Court's recently articulated view that the primary, if not the sole purpose of the exclusionary rule is to deter police misconduct. For where the police do precisely what the Court has consistently told them to do, that is to seek a warrant where feasible before searching or seizing, there is obviously no police misconduct where it turns out the warrant shouldn't have been issued. Instead, what you have is simply some kind of mistake by the magistrate.

Mr. CONYERS. Could that be called judicial misconduct?

Mr. WASSERSTROM. Yes; I think it would be misconduct, or at least a judicial mistake. But, again, as I say, at least superficially.

Mr. CONYERS. It is not punishable.

Mr. WASSERSTROM. At least superficially, it would be consistent with the notion that the exclusionary rule is to deter police misconduct, which is certainly what the Court has emphasized in recent years.

I think that it would not be surprising if the Court came out this way, but it would I think, be unfortunate in their doing so. It would also be somewhat anomolous. That is because the fourth amendment, though susceptible to various interpretations, clearly was enacted to assure that warrants should not be issued except upon probable cause. That is what the fourth amendment says explicitly. And what the framers of the fourth amendment were concerned most directly about when they wrote the fourth amendment was wide-ranging searches conducted pursuant to what were then called general warrants, warrants which authorized searches and seizures of all kinds of people and all kinds of items. These were, as I say, warranted searches, but searches not based on probable cause.

So, if the Supreme Court were to adopt an exception to the exclusionary rule for searches conducted pursuant to illegal warrants, it would be going back to a situation very much like the situation which the framers were most directly concerned about—that is, wide-ranging searches conducted pursuant to general warrants. As I say, although I think there would be an anomaly to this result, it would not be surprising if the Supreme Court now reached it.

I looked at the proposed legislation before Congress. Most of it would enact a far broader exception to the exclusionary rule than one limited to searches and seizures conducted pursuant to warrants later declared to be invalid. It seems to me that it would be unfortunate for the Supreme Court to adopt even a limited exception to the exclusionary rule, one which was only applied to warranted searches. But I think it would be far worse if the Court or Congress adopted a broader exception to the exclusionary rule, or if Congress were to enact the legislation that has been introduced.

Most of the legislation that has been proposed would allow into evidence any illegally seized materials, so long as the police officers

acted in reasonable good faith when they conducted their search and seizure—that is, if they reasonably and in good faith believed that their conduct conformed to the fourth amendment. The legislation would simply make the fact that the search was conducted pursuant to a warrant, sort of a per se finding of reasonable good faith, but it would go much farther than this limited exception to the exclusionary rule.

Mr. CONYERS. I have heard much about the role of law enforcement in the real world. Americans have been concerned increasingly with crime; the police face an enormous task—to protect society from what appears to be increasing lawlessness. We are pressing for more vigorous law enforcement, more stringent application of the criminal law and more severe punishment. According to this argument, we should not worry about whether an arcane constitutional provision is being strictly observed.

The question is: Can we have it both ways—enhanced law enforcement and scrupulous attention to the fourth amendment?

Mr. WASSERSTROM. Let me just say I don't for a minute consider the fourth amendment itself to be an arcane outmoded, constitutional provision of little importance. On the contrary, I think that it is the fourth amendment that protects us from a police state imposed by the majority. It is the only provision in the Constitution, aside possibly from the first amendment, which prevents the police from acting any way they want.

Now, if people are troubled by the fact that the fourth amendment imposes restrictions on the police, then it seems to me what they ought to do about it is try to enact some kind of repeal of the fourth amendment. Many of the criticisms which are voiced seemingly about the exclusionary rule are really, it seems to me, directed at the fourth amendment, or at least at the way courts have interpreted the fourth amendment.

All the exclusionary rule does is say that where the police violated the fourth amendment, evidence should be excluded. If we want the police to be able to do more than they are allowed to do under the fourth amendment, then we ought to do something about the fourth amendment, not about the exclusionary rule. It does seem to me that much of the criticism of the exclusionary rule is really disguised criticism of the fourth amendment, because nobody really wants to come out and say what we want to do is allow the police far more powers than they now have.

So, I think it is not the exclusionary rule that in any sense hamstrings the police. All the exclusionary rule does is say that where the police violate the fourth amendment, the evidence they obtain as result of their illegal actions should be excluded. It is the fourth amendment that tells the police what they can and can't do. It seems to me, as I say, that criticism of the exclusionary rule is largely misdirected. I think that the exclusionary rule is something of a red flag, because what people see is probative, relevant evidence being kept out of court and, at least in theory, guilty people going free. I think that this happens far less frequently than popular opinion would have——

Mr. CONYERS. To what extent is a law enforcement person inhibited by the operation of the fourth amendment?

Mr. WASSERSTROM. He is inhibited only in the sense that the fourth amendment tells him what he can and can't do. If he violates the fourth amendment, he is conceivably subject to civil suit, and this is another thing I think that is something of a misleading point. Many of the people that favor repeal of the exclusionary rule also claim to favor a strict civil remedy for those whose fourth amendment rights are violated. If what you are worried about is deterring the police from vigorously enforcing the law, it seems to me that a civil remedy directed at the individual police officer which, as you said, may cost him more money than he has and essentially bankrupt him entirely, would be a far more drastic deterrent to vigorous police enforcement than the exclusionary rule is.

All the exclusionary rule does is keep out of trial evidence. It takes away part of the incentives which the police might otherwise have to violate the fourth amendment. It says that the courts are not going to be open to evidence which is illegally obtained. But if you are worried about the police drawing back too far from the constitutional line, it seems to me a civil remedy directed at the individual police officer is going to deter police conduct which may be proper but close to the line far more than the exclusionary rule will.

Mr. CONYERS. But, many complain that police work is hampered because the police don't know where this line is? You dismiss this concern quite neatly by saying the fourth amendment just tells them what they can and can't do, but that is exactly what all the shouting is about.

Mr. WASSERSTROM. I think that there are valid criticisms that can be made of the Court's interpretation of the fourth amendment. I mean, in certain areas at least, the Court has not drawn the kinds of clear lines that can tell the police what they can and can't do. But, again, that, it seems to me, is a criticism of the way that the courts have interpreted the fourth amendment and not a valid criticism of the exclusionary rule as an enforcement mechanism.

Once we decide where the line should be—again, as I say, that is a question of interpreting the fourth amendment—once we decide where the line should be, it seems to me that those criticisms of the exclusionary rule as a mechanism for enforcing the fourth amendment are essentially beside the point.

Mr. CONYERS. What was the point of the President's allusion to the infamous baby diaper case in which the rule was misapplied?

Mr. WASSERSTROM. It seems to me—I don't know a lot about the facts of the case, but apparently there was some factual basis for what he said—but, again, his criticism there, it seems to me is directed at an interpretation of the fourth amendment. It may be that the court there should have upheld the search and seizure as valid under the fourth amendment. If it had been valid, then there is no problem and the evidence is not excluded.

Again, there, too, I think is a criticism of an interpretation of the fourth amendment, not a valid criticism of the exclusionary rule as an enforcement mechanism.

One of the points that I and my coauthor tried to make in this article is that the exclusionary rule is an essential tool for development of fourth amendment law. Without the exclusionary rule the

fourth amendment law simply ceases to be articulated. It is in the context of exclusionary rule cases that fourth amendment doctrine is promulgated. It is very difficult for me to see any other context in which it could be promulgated. It seems to me that, to eliminate the exclusionary rule altogether would ossify, petrify, fourth amendment doctrine as it now exists. It seems to me that would be a very, very bad thing to do, because there are all sorts of technological changes which permit the State, the Government, to do all sorts of surveillance and spying which was not possible before and which would simply, I think, end up being outside of the reach of the fourth amendment because there would never be litigation concerning what it is that they can and can't do.

Mr. CONYERS. Would you expand on that, please.

Mr. WASSERSTROM. Yes; my real point is that not only would that happen if you eliminated the exclusionary rule altogether, it also happens if you adopt a good faith exception to the exclusionary rule.

The reason why it happens if you adopt a good faith exception is this: Under a good faith exception, almost surely anytime the police officer is relying on a plausible interpretation of existing law in doing what he did, his conduct will be found to have been reasonable and in good faith. If that is so, then a court will never even reach the question of whether his conduct should now be declared to be in violation of the fourth amendment.

The court could conceivably issue an advisory opinion saying, "In this case, we are ready to announce that what the officer did here is unconstitutional under the fourth amendment. However, he had no way of knowing it, given what we said 5 or 10 years ago about this subject. Therefore, the evidence should be admitted."

Even if courts were ready to indulge in issuing such advisory opinions—and this would run counter to established doctrines concerning the nature of judicial review and perhaps would even go beyond constitutional limits on the court's jurisdiction—even if the court were ready to issue such advisory opinion, the occasion for their doing so wouldn't arise because the individual defendant, the litigant who asks the court to exclude evidence, has no incentive to pursue his claim if he knows that, even if his claim is vindicated in some abstract sense, he is not going to benefit from it because the evidence is going to be admitted in his case. The sort of defendants who raise exclusionary rule issues and the kind of representation they have, which is generally by hard-pressed court-appointed lawyers, those lawyers are not going to be able to take the time and effort that it takes to pursue an abstract legal issue up to a high-level appellate court simply because they want to see the court issue an advisory opinion, of no use to their client, about the reach of the fourth amendment.

If you consider some of the very important Supreme Court decisions of the last 10 or 15 years, it is hard to see how almost any of them would have been litigated at all, much less decided the way they were, if there had not been an exclusionary rule or if there had been a good-faith exception to the exclusionary rule.

For example, in *Katz* vs. *United States,* where the court held for the first time that electronic surveillance and wiretapping were governed by the fourth amendment, the Court overruled decisions

such as *Olmstead,* where it had held, 40 years before, that there simply was no fourth amendment violation unless there was a physical trespass onto the suspect's property.

If there had been a good faith exception to the exclusionary rule, who would have bothered to raise the issue of *Katz*? For it is fairly clear that the FBI agents who did what they did in *Katz*—that is, put a microphone on a public telephone booth so they could pick up the conversation of the defendant—reasonably thought they had every right to do that given what *Olmstead* had said the reach of the fourth amendment was. They did not physically trespass onto anybody's property. What the court said in *Katz* is that that approach that it had taken in *Olmstead* was wrong, that the fourth amendment shouldn't be limited to physical trespasses on to private property, but rather that there is a fourth amendment issue wherever there is an invasion of somebody's reasonable expectation of privacy.

That was a very, very important decision. It extended fourth amendment controls to electronic surveillance and wiretapping in a way that it had never been extended before—though Congress had enacted statutes dealing with it. But that case might well not even have been litigated, much less decided, if there had been a good-faith exception to the exclusionary rule.

Mr. McCollum. I wanted to pursue something with you here. You have made an underlying assumptive statement that the good faith exception would result in good faith being most often found whenever it was litigated.

I challenge that assumption on your part because you are, I would assume from that conclusion, drawing also the conclusion that our justice system would inevitably fall on the side of law enforcement in our decisionmaking process. In good faith areas, at least where I have been involved in litigation, that is not always, by any stretch of the imagination, the case.

Mr. Wasserstrom. The point I am making is simply that where there is reliance on prior law, it seems to me that that is a paradigm example of good faith. If the good faith exception were to apply anywhere, it would surely apply to cases where what the police claim is that they relied on the law as they reasonably understood it to be. Indeed, this is the example which is usually given by those advocating that a good faith exception be adopted. And if it is adopted, then the law can't move, the law can't change. It is true that the police act in good faith where they rely on prior law. It is hard to see how that is bad faith. If they rely on a plausible interpretation of prior law, it is good faith.

So, what does the Court do when it is faced with a case where the Government is claiming good-faith reliance on prior law, the defendant is asking for an extension of prior law, or a change in the prior law? There is no way that that issue, if it even gets litigated—and I am suggesting that it is not going to be litigated at all—but if it gets litigated, I don't see how the Court ever decides the issue and does decide that it wants to extend the prior law or change the prior law in some way, or indeed, even clarify the prior law.

Mr. McCollum. Of course, that could get into a whole interpretation of what we are litigating when we litigate good faith, and

what the good-faith exception would be as it is understood. For example, in one method of looking at good faith, you could look at good faith from the viewpoint of whether the police officer exercised good faith in believing he had probable cause, believing he had hot pursuit, any number of things that are not technical, not relying on prior law, but relying on facts.

Mr. WASSERSTROM. That is right. And the fifth circuit decision in *Williams,* talked about these two facets to the good faith exception, one for factual mistakes by the police and one for technical mistakes, what it calls technical violations.

The Justice Department, though, for example, when Mr. Jensen testified, he gave as an example—and it seems to me that this is the one that is given most often—examples of good faith is reliance by the police on existing law.

Now it would be possible to construct a good faith exception that didn't include reliance on prior law and only involved, for example, as you suggested, factual mistakes by the police. I would object to that facet of the good faith exception on totally different grounds. It seems to me that existing law, in effect, incorporates good-faith mistakes as a justification for police conduct. I mean, the standard for probable cause is this: Did the police, given what they knew, what they could reasonably believe given their perceptions at the time they acted—and the courts have said that is also considered—given everything they knew and given what they know about law enforcement, is what they did reasonable under the circumstances? Did they have sufficient ground to believe that the search which they conducted would be fruitful or the arrest that they made would be an arrest of somebody who had in fact committed a crime?

Therefore, if you are going to say that there should be an exception to the probable cause requirement for good-faith mistakes about the existence of probable cause, then, it seems to me, all you have really said is that we no longer require probable cause but something less than that. Again, that is something that you might want to do, but it seems to me that that would require amending the fourth amendment, or at least convincing courts that they have been way off track in interpreting probable cause as the essential predicate for searches and seizures.

Mr. MCCOLLUM. I would have to agree with you that whatever is done in this area, you have to be very careful about your definitions and what area you probe. I certainly would think we ought to narrow it to factual concerns.

But for most of the people in the offices with whom I have spoken, who deal with this problem, prosecutors in particular, the concerns are primarily factual. Their concerns are primarily in areas such as hot pursuit, or if a police officer honestly enters a home and really believes certain things. These cases are perhaps not the dominant ones, but oftentimes they are the bigger ones. They are oftentimes the ones that are thrown out, and they are very costly and very expensive, and there are close questions about them. If we could craft, or if the courts could craft, a good definition of good faith, it would seem to me we would strengthen the exclusionary rule, not weaken it.

I understand your apprehension because I am very much a strong believer in constitutional due process and rights of the fourth amendment and in the opportunity to protect privacy, but I am also concerned about the rights of the victim and the rights of the public. Right now there is, it seems to me, a pendulum that swung a little bit too far in the wrong direction.

Mr. WASSERSTROM. Congressman, it seems to me that where the police do something that they think is hot pursuit and a court later decides it wasn't hot pursuit, but we feel as a people that what they did was proper, then we should be criticizing the courts for deciding that what they did was improper.

The way to do that is to convince courts that they have simply misapplied the fourth amendment, that they have disallowed certain kinds of police conduct that they should have found legitimate and valid under the fourth amendment, and that they should perhaps change their definition of hot pursuit, should perhaps give the police more discretion with respect to deciding when there is hot pursuit, or they should perhaps say that the factors that should be considered are different from the ones that they said before should be considered.

Mr. MCCOLLUM. But that is relinquishing a legislative prerogative to the courts that perhaps we could keep ourselves, and provide some guidelines that might be more meaningful, since many of us don't happen to think the courts have done overly well in interpreting some of these matters.

Mr. WASSERSTROM. Then maybe, it seems to me, what you should be doing is considering legislation which asks the courts to reconsider its definition of such issues as hot pursuit and probable cause. It does seem to me, if nothing else, it is somewhat hypocritical to say we agree that the police shouldn't have done what they did here and, yet, keep telling the police that if you do this kind of thing, we will allow the evidence in. If you say we are going to let in evidence where the police have made factual errors, what you have really done is redefine probable cause or hot pursuit.

Mr. CONYERS. Excuse me, Congressman McCollum, we will resume our discussion after a vote in the House. The subcommittee stands in recess.

[Recess.]

Mr. CONYERS. The subcommittee will come to order.

We are pleased to continue with the testimony of Professor Wasserstrom.

Mr. WASSERSTROM. Thank you, Mr. Chairman. Maybe I could, to some extent, sum up my testimony.

I would say that the good faith exception, where it is applied to exempt from the exclusionary rule evidence seized where the police have acted on reliance on prior law—that is, if the exception were to apply in those situations—then you would have the effect I mentioned before of freezing the law as it is now. There would simply be no incentive to litigate and, even where there was litigation, the courts would not issue advisory opinions changing the law or clarifying the situation where there is now uncertainty in the law.

Let me just, if I could, briefly discuss the *Williams* case itself where the fifth circuit adopted the good faith exception. In that case, the legality of the search turned on whether or not a Drug

Enforcement Administration officer had the authority to arrest a suspect who he believed had violated a condition of her release. She was on bail pending appeal. And the issue was whether DEA agents are authorized to make arrests for such violations. This is a very difficult legal issue, one that the court had never decided.

If you had a good faith exception to the exclusionary rule in place at the time of *Williams,* the court would have done just what it did, which is to say, "We don't have to decide whether DEA agents can do what the officer did here, because whether they can do it lawfully or not, the officer here reasonably believed he could do it, and it is a closed case." The law would have remained unclear, and a DEA agent in the future in the same situation would have gone ahead, presumably, and made the arrest on the same facts and would have conducted a search incident to the arrest. And when the case comes up again, the court does the same thing. It says, "We don't have to decide whether DEA agents can make arrests in this situation. The fact is this agent reasonably believed he could make the arrest." So the law never becomes clarified on that issue because, again, in each case the policeman acted on reasonable reliance on this uncertainty in the law.

Mr. McCollum. May I interrupt at this point? What is wrong with the person reasonably believing that he could make the arrest and that being perfectly legal? The standard is reasonably believed. My goodness gracious, that seems to me to be satisfactory.

Mr. Wasserstrom. But what we want is the court to say that you can or can't make an arrest here. The court never does that.

If the court wants to say—and the court, in fact, in the fifth circuit in a separate opinion does say—DEA agents are authorized to make arrests here, that is fine. My point is simply that under a good faith exception, let's assume that the court wants to say, or would be ready to say, that DEA shouldn't be making arrests here, the fact is they never have the occasion to make that ruling.

Mr. McCollum. I can understand that you want them to have the occasion to make a ruling, but sometimes there are superseding concerns. It seems to me that if the police or arresting officer reasonably believes that he was doing the right thing, then it is a standard which is a satisfactory for many, many things in law. Why isn't it satisfactory here?

Mr. Wasserstrom. On the assumption that he is doing the wrong thing, we want to tell him that. You see, if he is doing the right thing, we have no problem. We just tell him he is doing the right thing, and we say, "Go ahead, do it again in the future." But then you don't need a good faith exception to let in the evidence; it is admissible anyway.

Mr. McCollum. But there is an underlying requirement that the person was reasonable in his conclusions, that it is at least a gray enough area that maybe there shouldn't be that kind of drawing of lines.

Mr. Wasserstrom. I understand that you are talking about a situation where there is a difference in judgment about the facts. I am talking here, and this is the issue in *Williams,* about a purely legal issue, and that is are DEA agents authorized under the law to make arrests in this kind of situation, not because the facts may be this way or that way. The real issue in *Williams* was whether vio-

lating a condition of release constituted an offense against the United States for purposes of a DEA agent's arrest powers.

Mr. McCollum. I may yield to you on the legal side of the two-pronged question of good faith, but I don't want to let it go by that the reasonableness of the belief is totally unchallengeable as a standard.

Mr. Wasserstrom. Let me go on, though. I was first going to just reiterate what I said before about that.

With respect to application of the good faith exception to searches conducted to warrants—the sort of issue that arose in *Gates* itself and the sort of situation which advocates of the good faith exception commonly point to, that is where the magistrate does issue a warrant—it seems to me, as I said before, that there is a historical anomaly at least in that, it was precisely searches conducted to warrants without probable cause that the fourth amendment was directed at preventing.

But also, not so much in the Federal system but in the States, it would be a very dangerous precedent. In a case of a few years ago which was not widely noted, *Shadwick* v. *City of Tampa,* the Supreme Court upheld the issuance of warrants by court functionaries who had no legal training whatsoever. Consequently, although in the Federal system magistrates are, perhaps, in relevant ways comparable to judges, in the States, magistrates—that is people who are authorized to issue warrants, may be, say, barbers, or grocers who are totally untrained in the law and have no familiarity with the case law. Thus, especially with respect to the States, it would be very unfortunate to rule that whatever the police do pursuant to a warrant is not subject to the sanction of the exclusionary rule.

Finally, your example, Congressman McCollum, about reliance on perception of the facts which may have been later determined to have been mistaken, again, I would say that existing law accommodates that situation. The question under existing law is did the policeman, from his perspective at the time he acted, reasonably believe that he had adequate grounds to do what he did. If it turns out he was wrong in the sense that the facts were not as he reasonably believed them to be, that does not invalidate his action. In other words, if he reasonably believes that you, let's say, have committed a crime such as robbery and on that basis arrests you and it turns out you didn't commit the robbery, but in the course of a search incident to the arrest he discovers drugs, those drugs are not excludable, for he reasonably believed you committed the robbery. The fact that he was wrong about that doesn't mean the evidence will be excluded.

It seems to me that this reasonableness and this good faith is built into existing law. Unless what you are trying to accomplish with the good faith exception is to change existing law to the point where you no longer are requiring the police to truly have probable cause, then you don't want them to be able to act with something less than probable cause and you don't need the good faith exception.

Again, if what you want is to lower the standard from probable cause to something else, then it seems to me the thing to do is to say that directly, to say that we think what the police did here is

the sort of thing we want the police to do in the future. It may be that the courts have said they shouldn't be doing this, but we think they should be doing this. The way to do that is not by saying the exclusionary rule shouldn't apply. If you say the exclusionary rule shouldn't apply, what you are saying is the cops shouldn't be doing this kind of thing, but, nevertheless, we are going to let the evidence in even though they shouldn't be doing it. If you want to authorize them to do it, then you should do it directly. Just say that these situations do constitute hot pursuit, this does constitute probable cause. Or amend the Constitution.

It seems to me that an exception to the exclusionary rule is not the way to do it. As I say, there is a certain hypocrisy about it. When you do it that way, you are saying to the police that we don't want you to do this. You would be telling them that what they did here is wrong, but that we are not going to attach any consequences to their doing it. Thus you would be winking at them as you tell them not to do it again.

Mr. CONYERS. Let me ask you to describe how society pays for the exclusionary rule in terms of benefits and the cost.

Mr. WASSERSTROM. I think the benefits are that police, in many situations where they otherwise would act unlawfully, refrain from doing so because they realize that there will be no gain in law enforcement by acting unlawfully. I also think the benefits—perhaps a more important benefit almost—is simply that it is a mechanism through which the courts can articulate the contours of the fourth amendment itself. Simply articulating the contours of the fourth amendment is a way of deterring police misconduct, because I don't doubt that policemen, for the most part, are trying to live within the confines of the fourth amendment. If the courts tell them clearly what they can and can't do, I think that most police officers will try to live up to their constitutional obligations. It is only, as I say, through the exclusionary rule that this delineation of the law will take place.

Let me just give one more example. A few years ago, the Supreme Court decided a case called *Prouse* v. *Delaware*. There, the Supreme Court ruled that random traffic stops were unconstitutional because of the possibility that they were being conducted in an arbitrary, discriminatory fashion, that only people of a certain race or people who looked a certain way were being stopped. Instead, the Court said, if the police want to make traffic stops, they have to do it in some systematic way, pursuant to a plan, such as stop every 10th car or put up a barricade and stop every car that comes by.

The issue in *Prouse* arose because of the defendant filed a motion to exclude marihuana found in his car after a random traffic stop. Without the exclusionary rule or, again, if there had been a good faith exception to the exclusionary rule, *Prouse* never would have been decided because what the police did in *Prouse* was almost certainly valid under what law there was on the subject at the time they did it.

Now, as soon as *Prouse* was decided by the Supreme Court, as soon as they said there can't be random traffic stops, jurisdictions such as Delaware where the case arose, and the District of Columbia where I looked into it, reacted immediately. Immediately the

police departments disseminated information about the decision to their officers and ordered them to stop making random traffic stops.

I don't think, as far as I know, there have been exclusionary rule cases since involving random traffic stops because I think police have simply stopped making them.

Mr. CONYERS. But not everywhere.

Mr. WASSERSTROM. They may still be going on, and where they are going on——

Mr. CONYERS. Let me say that I have been informed that in the State of Mississippi, black citizens are stopped regularly. Should I advise them of *Prouse*?

Mr. WASSERSTROM. If it is the State police, or any police department in Mississippi, they should be advised of *Prouse.* There can't be random traffic stops just to check on license and registration, at least not within the confines of the fourth amendment.

What you ask is what I think makes my point. Where the police are not living up to the fourth amendment, the exclusionary rule may help to induce them to live up to it. Where the police are eager to live up to the fourth amendment, the exclusionary rule is a mechanism through which the courts can tell the police what they can and can't do.

As I say, in jurisdictions like the District of Columbia and in Delaware, at least as far as the top of the departments are concerned, they have asked and ordered their men to cease making traffic stops. If the police obey that, then there won't be exclusionary rule cases arising in the future with respect to random traffic stops. In the one case where it did arise, *Prouse* v. *Delaware,* the rule enabled the Court to articulate a very important principle, one which, if it is obeyed, would protect the people which you mentioned in Mississippi.

Mr. CONYERS. Perhaps the exclusionary rule is not an altogether adequate remedy. It is wonderful to the extent that it inhibits and deters illegal police misconduct. But I don't know how satisfied one of your clients would be to know that the evidence was excluded from the court, after it has destroyed his reputation in the meantime, causing him to lose his job, and maybe even his wife? His reputation in the community has been wiped out, but we tell him the exclusionary rule is really great because the illegal evidence was not admitted in his case.

Mr. WASSERSTROM. It is true that all the exclusionary rule does is take away an incentive which police might otherwise have where there objective is to get a conviction. If they are not interested in getting a conviction, if they are interested in harassing people and simply exerting authority over them, the exclusionary rule is not going to serve as a deterrent.

Mr. CONYERS. As a matter of fact, this personal injury is quite beside the point of whether the evidence is excluded or included.

Mr. WASSERSTROM. That is right. I think it is important to allow civil remedies also. There are, at least potentially, civil remedies which somebody who is subject to an illegal search and seizure can use.

Mr. CONYERS. Have you ever heard of a civil injury case based on the violation of the fourth amendment?

Mr. WASSERSTROM. Occasionally, but not often.

Mr. CONYERS. I would say that we are now talking in the area of ethereal constitutional rights.

Mr. WASSERSTROM. That is right.

Mr. CONYERS. As I understand it, you must be in a position to hire the greatest trial lawyer in America, in order to win. If you have enough time and money, you can win such a case. Do you know how much you would win?

Mr. WASSERSTROM. Well, it is going to be up to——

Mr. CONYERS. Do you know how much you would win?

Mr. WASSERSTROM. I know of one case, as it happens, where somebody recovered a fair amount of money because she was arrested and later searched for eating an apple on the subway.

Mr. CONYERS. How much was that fair amount?

Mr. WASSERSTROM. I think it was something close to $20,000. But that is an unusual case. I think the jury was so appalled by the fact that she was arrested and then subject to some kind of strip search for eating an apple that they awarded what were essentially punitive damages.

Mr. CONYERS. In other words, Professor, I am trying to bring this discussion around to the real concerns of our constituents. Will the exclusionary rule stop one Detroit police officer from doing precisely what the rule was designed to prevent in 1914?

Mr. WASSERSTROM. *Weeks* was in 1914. Arguably, it goes back even further than that, to *Boyd* in, I think, 1886.

Mr. CONYERS. In other words, this is great stuff among lawyers, a great subject for law journals, beautiful theory for law students. Out in the streets, it isn't worth two quarters because you have, in effect, absolutely no protection from the first police officer who feels like violating your rights. You may be without any fault, but the police officer may not get punished at all. In some police jurisdictions, he is rewarded for violating the fourth amendment. It won't have a negative impact on his career. He was game enough to go ahead anyway and, even though the soft judge stopped the evidence from coming in, the cop did OK by his profession and by the standards in which so many of them, unfortunately, operate.

So, I ask you, isn't there something more adequate that those of us on this committee and those of you in your profession might want to consider doing to make the fourth amendment a real protection?

Mr. WASSERSTROM. I think there are all sorts of reasons why it might be important to try to do something beyond the exclusionary rule in order to try to prevent police misconduct. But I don't think anything you said is reason to eliminate or make any kind of cutback on the exclusionary rule itself. You are just suggesting, I think, that there should be supplements that may be more effective with respect to what is really going on at least in certain parts of the country.

The problem is that—as I say, the civil remedies, at least in principle, exist—the fact they are in reality not likely to lead to an adequate recovery. What you are finally, I think, suggesting is that there are problems not with the doctrines, but with their implementation.

Mr. CONYERS. We would welcome any suggestions you may have for improving the laws.

Mr. WASSERSTROM. The problem is that there aren't nearly enough competent lawyers to represent criminal defendants in criminal cases. What you are suggesting is that there should be a lot more legal services available to people who are subject to illegal searches and seizures who are perhaps not then charged in a criminal case.

I think the answer to that is to appropriate a lot more money to legal services for poor people so that they can get representation even when they can't afford to retain a lawyer.

Mr. CONYERS. I am glad you are in the private sector and not in the public sector.

Mr. WASSERSTROM. So am I. I don't think it is a problem with the laws as they exist. It is a problem with the fact that poor people don't have the resources to pursue the remedies which the law gives them. The laws are there. They are entitled to recover some damages.

Mr. CONYERS. Do you mean that even though the law doesn't provide you with a remedy the law is no obstacle?

Mr. WASSERSTROM. It does afford a remedy.

Mr. CONYERS. The remedy is zero, zero monetary recovery. I mean I really am shocked by your argument, sir.

Mr. WASSERSTROM. You are entitled to recover for violation of your fourth amendment rights.

Mr. CONYERS. And the fact that you can't recover any money is tough.

Mr. WASSERSTROM. The reason you can't recover any money is that you don't have the resources to hire a lawyer, or because you can't convince juries that they ought to feel differently about this issue than they do.

Mr. CONYERS. The reason you can't recover is because of the way the law is written, not because you don't have a lawyer.

Mr. WASSERSTROM. I would respectfully disagree with you. The law does permit recovery for damages resulting from a violation of fourth amendment rights. Again, I just don't think the problem is really one with the laws as they are written; the problem is one stemming from the distribution of resources in the society.

Mr. MCCOLLUM. Mr. Chairman, I must agree with the professor in this particular case. I happened to have been involved with some of the civil rights litigation in police cases. I think the law does provide an avenue to do that, but the exclusionary rule does not. It wasn't intended to do that. It was a court mechanism for trying to get a grip on the problem when the case is brought up against a criminal, not the other way around. It seems to me that, with all due respect of the chairman, that you are stretching the point considerably to discuss the exclusionary rule and recovery of damages, civil damages, in the same breath.

However, I am not a big fan of the present working of the exclusionary rule, and I am not convinced that it deters in the manner in which the professor believes that perhaps it does. But I do believe that the two subjects just don't fit together that well.

Professor, I personally commend you for your being with us today and commenting on all these subjects. I think the question of

the exclusionary rule is extraordinarily important. If we are going to provide as a society a form of protection under the fourth amendment, we have got to have mechanisms to do it. And for us to run pell-mell into the exclusionary rule, and just do away with it without this kind of airing, would be folly. I don't think any of us wants to see that happen.

But I do definitely have some differences in opinion with you, apparently, over the good faith question. I would hope that as this question is pursued—I assume it will be—that perhaps an exchange of these ideas can continue.

Mr. CONYERS. I would like to thank you for coming here, sir. I have been very impressed with your written work and testimony. I would like to invite you back to testify on a number of matters.

Mr. WASSERSTROM. I would be happy to come back anytime the chairman asked me.

Mr. CONYERS. Thank you very much.

[The article of Professor Wasserstrom, submitted in lieu of a prepared statement, follows:]

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: DEREGULATING THE POLICE AND DERAILING THE LAW

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The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law

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For many years, courts and commentators have criticized the fourth amendment exclusionary rule as being both a device for "freeing the guilty," and an ineffective deterrent of illegal police conduct. Recently, this criticism has assumed a more tangible form; in United States v. Williams, *an en banc majority of the Fifth Circuit endorsed a "good faith" exception to the rule. In this article, Professor Wasserstrom and Mr. Mertens examine the exclusionary rule as a deterrent, and suggest that through a variety of methods the rule sufficiently discourages police misconduct to justify its retention. In addition, they use the* Williams *decision to illustrate the theoretical limitations of the good faith exception, and to demonstrate the problems it will cause in practice. They conclude that the exception will both dilute substantive fourth amendment standards and impede the development of fourth amendment law. Finally, the authors suggest that the current attack on the exclusionary rule may actually mask its critics' dissatisfaction with the requirements of the fourth amendment itself.*

I. INTRODUCTION

In 1914, the Supreme Court unanimously held in *Weeks v. United States*[1] that evidence seized in violation of the fourth amendment[2] is inadmissible in federal criminal prosecutions.[3] From its inception, this doctrine, which came to be known as the exclusionary rule,[4] was bitterly attacked by many commen-

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The views expressed in this article are solely those of the authors, and do not necessarily reflect those of the Public Defender Service for the District of Columbia.

1. 232 U.S. 383 (1914).
2. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
3. 232 U.S. at 388.
4. Justice Frankfurter was the first member of the Supreme Court to use the term "exclusionary rule." United States v. Johnson, 319 U.S. 503, 520 (1943). Justice Black, however, was responsible for popularizing it as a term to describe the doctrine that evidence obtained in violation of the fourth amendment is inadmissable in a criminal prosecution. *See, e.g.,* United States v. Rabinowitz, 339 U.S.

tators.[5] Within the Supreme Court, however, the exclusionary rule stirred little controversy,[6] until thirty-five years later when the Court decided *Wolf v. Colorado*.[7]

56, 66-70, 71 (1950) (Black, J., dissenting), *overruled*, Chimel v. California, 395 U.S. 752 (1967); Wolf v. Colorado, 338 U.S. 25, 39 (1949) (Black, J., concurring), *overruled*, Mapp v. Ohio, 367 U.S. 655 (1961); United States v. Wallace & Tiernan Co., 336 U.S. 793, 798 (1949) (Black, J., writing for the Court). The term is now used to describe the exclusion of evidence on a variety of grounds. *See* note 52 *infra*.

5. Wigmore's attack was typical. 4 J. WIGMORE, WIGMORE ON EVIDENCE § 2184 (2d ed. 1923). Wigmore characterized the method of suppressing evidence as follows:

> "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."
>
> Some day, no doubt, we shall emerge from this quaint method of enforcing the law . . . . It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice.

Id.

The most celebrated criticism of *Weeks*, however, remains that of Justice (then Judge) Cardozo in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). A single phrase in that case encapsulates the basic point made by virtually all of the rule's detractors: under the exclusionary rule, "[t]he criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587.

But this way of putting it is misleading, for it implies that if the constable had been more careful, the criminal would not go free. This may be so where the constable's only "blunder" was his failure to comply with the warrant requirement where one could have been obtained. When there is no probable cause for an arrest, however, it is not the constable's blunder that results in a criminal's going free. If the constable had abided by the constitutional standard, the criminal would still "go free," because he would remain unapprehended. It may be that it is only by virtue of the constable's blundering—violating the constitutional standard—that the criminal will be prosecuted at all.

6. Although the exclusionary rule itself did not stir great debate within the Supreme Court, the nature and scope of the privacy rights protected by the fourth amendment did. In *Olmstead v. United States*, Justices Holmes and Brandeis, in separate dissenting opinions, discussed whether the seizure of evidence through a wiretap that involved no physical trespass violated fourth and fifth amendment privacy rights. 277 U.S. 438, 469 (1928) (Holmes, J., dissenting), *overruled*, Katz v. United States, 389 U.S. 347 (1967); *id.* at 471 (Brandeis, J., dissenting).

Professor Posner has described the debate in *Olmstead* as involving whether the fourth amendment protects only the interest "in being left alone"—a right to seclusion—or also an interest in "concealing information—a right to secrecy." R. POSNER, THE ECONOMICS OF JUSTICE 272-73 (1981). Ironically, Professor Posner borrowed the phrase "the right to be left alone" from Justice Brandeis' *Olmstead* dissent, 277 U.S. at 478, and used it to describe the right to be free from physical intrusions, or, as he put it, "barging ins." R. POSNER, *supra*, at 311-12. Justice Brandeis, however, used the phrase much more broadly to extend fourth amendment protection to wiretaps, which involve no physical intrusion. He wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

277 U.S. at 478 (Brandeis, J., dissenting) (emphasis added). Somehow, this conveys a more enobling conception of man than the interest in "concealing information" and in being free from "barging ins" would seem to suggest.

7. 338 U.S. 25 (1949), *overruled*, Mapp v. Ohio, 367 U.S. 643 (1961). Although the exclusionary rule did not divide the Court until *Wolf*, even before *Weeks* the Court had vacillated about whether the fourth amendment itself applied to the states. *Compare* Adams v. New York, 192 U.S 585, 594, 599

In *Wolf*, a sharply divided Court held that the fourth amendment right to be secure from unreasonable searches and seizures applied to the states through the due process clause of the fourteenth amendment;[8] nevertheless, the Court refused to require the states to enforce the right through the exclusionary rule.[9] Twelve years later, in *Mapp v. Ohio*,[10] the Court overruled *Wolf* and extended the exclusionary rule to the states.[11] After *Mapp*, the debate over the rule intensified. Still, as recently as 1965, one leading commentator saw "no basis for assuming that the Court will make any inroads on the *Mapp* holding in the years ahead."[12]

It has not turned out quite that way. In the years following that sanguine prognosis, the Burger Court had so eviscerated the exclusionary rule that by 1974, Justice Brennan, its staunchest supporter on the Court, feared that "a majority of [his] colleagues [had] positioned themselves to abandon altogether the exclusionary rule in search and seizure cases,"[13] not only in its application to state courts, but in the federal courts as well. So far, at least, it has not turned out quite that way either.

Instead, a majority of the Court seems to have accepted Chief Justice Burger's invitation to "reexamine the scope of the exclusionary rule and consider

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(1904) (suggesting, without deciding, that fourth amendment governed state officials) *with* Twining v. New Jersey, 211 U.S. 78, 92 (1908) (holding that first eight amendments to Constitution applied only to federal government).

8. 338 U.S. at 28. The first section of the fourteenth amendment reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

9. 338 U.S at 33. *Wolf* spawned five separate opinions in the Supreme Court, with Justice Frankfurter writing for the majority. Justice Black concurred in both the decision and the reasoning of the Court. *Id.* at 39 (Black, J., concurring). He wrote that although the fourth amendment applied to the states, the "exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence," *id.* at 39-40, and as such was not applicable to the states.

Justice Douglas dissented. *Id.* at 40 (Douglas J., dissenting). He argued that the fourth amendment applied to the states, and that "evidence obtained in violation of it *must* be excluded in state prosecutions as well as in federal prosecutions," *id.* (emphasis in original), if the fourth amendment was to have an effective sanction. *Id.*

Justice Murphy, joined by Justice Rutledge, also dissented. *Id.* at 41 (Murphy, J., with Rutledge, J., dissenting). He agreed that the fourth amendment applied to the states, *id.*, but contended that: "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence." *Id.* at 44. Justice Rutledge also wrote a separate dissent calling for application of the exclusionary rule to the states. *Id.* at 47-48 (Rutledge, J., dissenting).

10. 367 U.S. 643 (1961).

11. *Id.* at 655. Although a five-justice majority overruled *Wolf*, only four of the five based their decision solely on fourth amendment grounds. Justice Black, concurring, felt that the fourth amendment alone was not enough to require applying the exclusionary rule to the states, *id.* at 661-62 (Black, J., concurring), but that "when the Fourth Amendment's bar against unreasonable searches and seizures is considered together with the Fifth Amendment's bar against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Id.* at 662.

12. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 392 (1965). Professor LaFave of the University of Illinois Law School has been referred to as "our leading search-and-seizure scholar." Kamisar, *Fourth Amendment Hatchback*, Wash. Post, Oct. 15, 1981, § A, at 29, col. 3. He has written extensively on the fourth amendment, and his remarkable three volume treatise, *Search and Seizure* (1978), clearly establishes his pre-eminence in the field.

13. United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., with Douglas & Marshall, JJ., dissenting).

at least some narrowing of its thrust."[14] The Burger Court has chipped away at the rule's edges, and has consistently confined its application, even in situations where the rule's purpose would clearly seem to require its extension.[15] Nevertheless, the Court has, thus far at least, preserved the rule in its paradigmatic application as a bar to the government's direct use in a federal prosecution of evidence seized unconstitutionally from a defendant.[16]

Thus, although it may not have been a great surprise, it was still newsworthy[17] when in *United States v. Williams*[18] the United States Court of Appeals for the Fifth Circuit, sitting en banc, carved out a sweeping exception to the exclusionary rule: "Henceforth in this circuit," the court announced, "when evidence is sought to be excluded because of police misconduct leading to its discovery,"[19] the evidence should be admitted when the conduct, even if "mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper."[20]

The *Williams* court tried to minimize both the novelty and the significance of its holding by claiming that the Supreme Court had already "all but explicitly adopted" an exception to the exclusionary rule for good faith violations of the fourth amendment,[21] and that its good faith exception would not "undercut the fourth amendment."[22] Indeed, the Fifth Circuit argued that its decision was not about the fourth amendment at all, but merely concerned the reach of the exclusionary rule,[23] which the court referred to as but one "device . . . for enforcing the amendment."[24] The court noted that it was simply restricting the rule's application "to conform . . . to its underlying purpose: to deter unreasonable or bad-faith police conduct."[25] This restriction, the court reasoned, would not affect the fourth amendment, because when the violation is made in good faith, "no deterrence is called for and none can be had."[26] Thus, the court concluded that "reason [as well as authority] plainly deman[d] explicit recognition of a good-faith exception" to the exclusionary rule.[27]

This article will seek to demonstrate that the *Williams* court is plainly wrong

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14. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 424 (1971) (Burger, C.J., dissenting).

15. *See* notes 105-09 *infra* and accompanying text (discussing situations where the Supreme Court has declined to extend the exclusionary rule).

16. *See* note 104 *infra*.

17. The Bureau of National Affairs, for example, printed the entire text of the Fifth Circuit's en banc decision in *Williams* in the *Criminal Law Reporter*. *See* United States v. Williams, 27 CRIM. L. REP. (BNA) 3293 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). This distinction is generally reserved for Supreme Court opinions.

18. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

19. *Id.* at 846.

20. *Id.* at 847.

21. *Id.* at 841. Although the *Williams* court exaggerated when it stated that the Supreme Court has "all but explicitly adopted" the good faith exception, four of the justices then on the Court had, at one time or another, indicated that they would go along with some modification of the exclusionary rule along the lines of *Williams'* good faith exception. With the replacement of Justice Stewart by Justice O'Connor, there may well be a majority on the Court that favors modifying the rule. *See* note 32 *infra*.

22. 622 F.2d at 847.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 841.

on both counts; its sweeping good faith exception is contrary both to authority—for it is inconsistent with numerous Supreme Court precedents—and to reason—for it is premised on a naive and simplistic understanding of deterrence. Even though the Fifth Circuit is the only court to have adopted the good faith exception, the *Williams* decision, however obvious its defects, deserves careful study. Not only is Congress[28] now considering codifying some form of good faith exception, but the Colorado legislature has already enacted one,[29] and several courts have cited *Williams* with approval.[30] Moreover, the

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28. S. 101, 97th Cong., 1st Sess., 127 CONG. REC. S154 (daily ed. Jan. 15, 1981); S. 751, 97th Cong., 1st Sess., 127 CONG. REC. S2401-02 (daily ed. March 19, 1981).

S. 101, introduced by Senator Dennis DeConcini of Arizona, would prohibit suppression of evidence in a federal criminal proceeding unless the law enforcement official's violation of the fourth amendment was intentional or substantial. S. 101, § 3505(a). The bill provides for a court to determine whether a violation was substantial by considering whether the violation was reckless, whether suppression will deter future such violations, the extent to which privacy was invaded, and whether, but for the violation, the things seized would have been discovered. *Id.* § 3505(b). Senator Orrin Hatch of Utah and Senator Strom Thurmond of South Carolina introduced S. 751, which would abolish the exclusionary rule altogether. S. 751, § 3505. If a federal agent violates the fourth amendment, S. 751 authorizes the victim to sue the United States government directly. *Id.* § 2692. Although the bill authorizies recovery of actual and punitive damages up to $25,000, it denies punitive damages to victims who have been convicted of any offense for which the evidence was seized. *Id.* S. 751 would also legislatively overrule Bivens v. Six Unknown Named Agents of Federal Bureau of Investigation, 403 U.S. 388 (1971), by denying the victim a cause of action against the individual federal officer who violated his fourth amendment rights. S. 751, § 2694. Instead, the offending officer would be subject to disciplinary action by the agency for which he works, but only if the agency determines that the officer lacked good faith when he conducted the search. *Id.* § 2693.

A notable feature of both these bills is that they modify or abolish the application of the exclusionary rule in only federal criminal proceedings. There was no testimony regarding whether Congress has power to overrule by legislation the application of the exclusionary rule to the states.

At hearings held on both these bills, D. Lowell Jensen, Assistant Attorney General for the Criminal Division of the United States Department of Justice, testified that although the Department supports the "intentional or substantial violation" test of S. 101, it would prefer to see the good faith exception of *Williams* enacted. *Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, Hearings on S. 101 and S. 751, The Exclusionary Rule Bills*, 97th Cong., 1st Sess. 23, 25, 32 (1981). Jensen argued that *Williams* was constitutional, but conceded that the question whether Congress could constitutionally abolish the exclusionary rule is for the Supreme Court to decide. *Id.* at 33. Unlike Jensen, Steven R. Schlesinger, professor of politics at the Catholic University of America, objected to the enactment of a good faith exception, and endorsed instead enactment of a disciplinary action against offending police officers and a civil remedy to compensate victims. Schlesinger charged that the good faith exception would result in little or no deterrence, make fourth amendment law even more impenetrable by making fine distinctions between good and bad faith, and put a premium on the ignorance of police officers who would have to convince a judge that they were uninformed as to fourth amendment standards. *Id.* at 85. Stephen Sachs, Attorney General of Maryland and former United States Attorney for the District of Maryland, testified against both bills. He claimed that the exclusionary rule was of constitutional origin and consequently beyond the reach of Congress. *Id.* at 43. Although the good faith exception sounds like a benign and wholesome phrase, Sachs argued, each time unconstitutional behavior is excused under the exception, the "benchmarks of fourth amendment compliance will drop another notch." *Id.* at 52.

29. COLO. REV. STAT. tit. 16, art. 3, § 308 (signed into law by Gov. Richard Lamm on June 5, 1981; H.B. 1493, 53d General Assembly, 1st Sess., Session Laws of Colorado Chapter 188, amending article 3 of title 16, COL. REV. STAT. 1973, 1978 Replacement Volume) (copy on file at *Georgetown Law Journal*). Not only does the recently enacted Colorado statute adopt the good faith exception, it also makes voluntariness the only requirement for admission of a confession, presumably regardless of whether *Miranda* warnings had been given. *Id.*

Two state constitutional amendments are pending in California concerning the exclusionary rule. One of the amendments would prevent the exclusion of evidence on "independent state grounds" when the California Supreme Court has interpreted the state analog of the fourth amendment more narrowly than the United States Supreme Court has interpreted the federal right to privacy. S. Const. Amendment 7, 1981-82 Sess. of the California Legislature. The second proposed amendment to the California constitution would abolish the exclusionary rule in state criminal proceedings. The amendment pro-

Attorney General's Task Force on Violent Crime relied on *Williams* in its recent report recommending that Congress adopt a good faith exception.[31] Thus, it is reasonable to expect the Reagan administration to propose a modification of the exclusionary rule along the lines of *Williams*. In addition, perhaps the most ominous portent of the case's importance is that five justices of the Supreme Court, at one time or another, have indicated that they would adopt some form of a good faith exception.[32] Analysis of the *Williams* good

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poses to set up a commission to certify police departments. In order to qualify for certification, the department must establish procedures for handling police misconduct. Evidence will not be suppressed if an officer from a certified police department violates the fourth amendment. The only penalty for violations of the fourth amendment would be that the department would lose its certification. Assembly Const. Amendment 31, 1981-82 Sess. of the California Legislature.

Both houses of the Montana legislature passed a bill that would have abolished the exclusionary rule in state criminal proceedings, but Governor Ted Schwinden vetoed the bill. Nat'l L.J., June 8, 1981, at 1, col. 3. The bill would have subjected offending police officers to civil liability and to disciplinary action. These provisions prompted law enforcement officials to lobby Governor Schwinden to veto the bill, which he did. *Id.* at 32, cols. 1-2.

30. Some state courts have applied the good faith exception in limited circumstances, instead of adopting a broad rule as the Fifth Circuit did in *Williams*. *See* Richmond v. Commonwealth, No. 80-CA-1366-MR, slip op. at 9 (Ky. July 31, 1981) (search not unreasonable when conducted by police who had good faith belief that judicial officer from neighboring county had authority to issue warrant); People v. Adams, 442 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981) (evidence not suppressed when seized by police officer under mistaken belief that person who authorized search had actual authority to do so). Other courts have stopped short of adopting a good faith exception, but have cited *Williams* as the most recent development in exclusionary rule doctrine. *See* People v. Eichelberger, 620 P.2d 1067, 1071 n.2 (Colo. 1980) (en banc) (exclusionary rule not intended to prevent police from carrying out their duties when police action is reasonable); People v. Smith, 620 P.2d 232, 235 n.4 (Colo. 1980) (exclusionary rule exists to deter willful, flagrant actions by police, not reasonable, good faith ones); People v. Pierce, 88 Ill. App. 3d 1095, 1102, 1110, 411 N.E.2d 295, 301, 307 (1980) (*Williams* test of "reasonable and good faith belief by the police in propriety of their conduct" met by state). *But cf.* Holloman v. Commonwealth, 275 S.E.2d 620, 622 (Va. 1981) (although court persuaded by *Williams* logic, good faith exception not applicable when police search places that could not reasonably conceal objects of search).

31. *See* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 56-57 (August 17, 1981) (Attorney General should support, in both legislature and courts, position that evidence obtained in course of reasonable, good faith search not excluded from criminal trials) [hereinafter TASK FORCE REPORT].

32. Chief Justice Burger and Justice Rehnquist have suggested strongly that they are ready to scrap the exclusionary rule altogether. Dissenting from a denial of stay in California v. Minjares, 443 U.S. 916 (1979), they challenged the continued justification for the exclusionary rule and wrote that they would have asked the parties to brief the question whether it should be retained. *Id.* at 916-28 (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). In another opinion, the Chief Justice called the rule a "Draconian, descredited device." Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring).

Justice Powell has written that he would favor a sliding scale approach to the exclusionary rule under which evidence obtained by "flagrant" fourth amendment violations would be excluded, but that obtained as a result of mere "technical violations" would not. Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., with Rehnquist, J., concurring in part).

Justice White, expanding on this theme, suggested in *Stone v. Powell* that the rule "should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for his belief." 428 U.S. 465, 538 (1976) (White, J., dissenting). Under White's approach, two requirements would have to be met before illegally-seized evidence would nonetheless be admissible: (1) the policeman must have acted with a good faith belief that his conduct was legal (a subjective test); and (2) he must have had a reasonable basis for such a belief (an objective test). *Id.* at 538-40. This is essentially the position adopted by the court in *Williams*.

At her nomination hearings before the Senate Judiciary Committee, Justice O'Connor refused to comment directly on how she would rule on a good faith exception. Because she expects the issue to be presented to the Court soon, she did not want to be accused of prejudging the issue. *Hearings Before the Senate Comm. on the Judiciary, Nomination of Sandra Day O'Connor*, 97th Cong., 1st Sess. 143 (Sept. 9, 1981) (unbound transcripts on file in Senate Document Room). She did testify, however, that evidence

faith exception, then, is not merely an evaluation of a lone case, but rather an analysis of what may be the next, and perhaps fatal, step in what Justice Brennan foresaw as the slow strangulation of the exclusionary rule.[33]

By examining both the exclusionary rule and *Williams*, this article will demonstrate that neither the Court, nor Congress, should take that step.[34] A good faith exception, far from having no effect on the fourth amendment, would have a devastating impact on its enforcement. If a good faith exception were implemented, criminal defendants would have no incentive to pursue novel fourth amendment claims, and even when such claims were raised, courts would not decide them. Thus, the exception would effectively choke off the development of fourth amendment law by any court that adopts it. The fourth amendment issues resolved in cases such as *Chimel v. California*,[35] *Katz v. United States*,[36] *Berger v. New York*,[37] *Delaware v. Prouse*,[38] and *Payton v. New York*[39] might never have been decided, or perhaps even litigated; all involved police misconduct that could have been excused under a good faith exception.

This article first sets the exclusionary rule in historical perspective, for though the *Williams* good faith exception is plainly inconsistent with Supreme Court precedent, its major premise—that the purpose of the rule is deterrence

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may not have to be excluded if standards were applied that take into account the good faith of police. *Id.* at 77-78 (Sept. 10, 1981). She testified that her understanding of the good faith exception is that it would apply when a police officer commits a "technical error," assumes he has a valid warrant that is ultimately determined to be invalid, or assumes he is operating under a case holding that has been overruled. *Id.* at 195 (Sept. 9, 1981). She also noted that the police officer's understanding of the particular facts involved should be taken into account. *Id.* The exclusionary rule may still have to be applied, she testified, if "force or trickery or some other reprehensible conduct has been used, but I have seen examples of the application of the rule which I thought were unfortunate on the trial court." *Id.* at 78 (Sept. 10, 1981).

33. *See* United States v. Peltier, 422 U.S. 531, 551 (1975) (Brennan, J., with Marshall, J., dissenting) (Court's opinion depends on understanding of exclusionary rule that "forecasts the complete demise" of rule); note 13 *supra* and accompanying text.

34. This article does not directly address the constitutionality of the good faith exception to the exclusionary rule, but only the wisdom of such an exception. If the defendant has a constitutional right not to be convicted with evidence illegally seized from him, as some commentators have argued and as some of the early Supreme Court cases suggest, then the exception is by definition unconstitutional because it would permit conviction on the basis of such evidence. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (essence of fourth amendment prohibits any use whatsoever of illegally-seized evidence); Weeks v. United States, 232 U.S. 383, 393 (1914) (to have value, language of fourth amendment must protect citizens from unlawful seizure and introduction into evidence of personal effects); Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 369 (1974) (defendant has personal constitutional right not to have illegally-seized evidence admitted against him); A.B.A. STATEMENT CONCERNING THE FOURTH AMENDMENT EXCLUSIONARY RULE 6 (June 1981) (submitted to the Attorney General's Task Force on Violent Crime) (statement of Prof. William W. Greenhalgh, Chairperson, Criminal Justice Section, Legislation Comm.) (federal exclusionary rule is requirement of due process; thus, legislative attempt to eliminate rule is facially unconstitutional) (copy on file at *Georgetown Law Journal*). Nevertheless, the Supreme Court has now clearly rejected the idea that the exclusionary rule vindicates the constitutional rights of the accused. The Court has held that the rule's sole purpose is to enforce the fourth amendment by deterring police misconduct. United States v. Janis, 428 U.S. 433, 446 (1976). Thus, any attack on the constitutionality of a good faith exception must take another direction. *See* note 100 *infra* (discussing *Janis* and outlining argument against constitutionality of good faith exception).

35. 395 U.S. 752 (1969).

36. 389 U.S. 347 (1967).

37. 388 U.S. 41 (1967).

38. 440 U.S. 648 (1979).

39. 445 U.S. 573 (1980).

of police misconduct—is firmly grounded in recent Court decisions. This premise surely would have shocked the members of the unanimous Supreme Court that first formulated the fourth amendment exclusionary rule in *Weeks*. When the rule was conceived, it was not premised on deterrence at all, but on an amalgam of values, and was viewed as inextricably bound up with the fourth amendment itself. Thus, the Court originally saw the suppression of evidence as a necessary consequence of a fourth amendment violation. This notion, that the rule is compelled by the Constitution, has given way to the view that the rule is only necessary as a means of enforcing the protections of the fourth amendment. The Court has thus shifted and successively narrowed the rule's underlying rationales to the point that its sole justification is now seen as deterrence of police misconduct.

Second, the article discusses the exclusionary rule as a deterrent, and examines the level of deterrence that the exclusionary rule must generate in order to justify its continued application. The article will argue that because the exclusionary rule is applied to enforce fourth amendment rights, the probable cause requirement of the fourth amendment suggests a level of deterrence ample to justify the rule—that for every suppression of probative evidence, the rule must deter one unfruitful search. Although critics of the rule contend that the exclusionary rule does not satisfactorily deter police misconduct, this section of the article demonstrates that critics overlook the synergistic effects of a viable suppression system. Further, these critics argue that the exclusionary rule hampers effective law enforcement by "freeing the guilty," and suggest that a tort remedy would be a more appropriate sanction for police misconduct. These suggestions are disingenuous; an effective tort remedy would have an even greater negative impact on law enforcement, because such a remedy would deter more lawful police conduct than does the exclusionary rule, and an ineffective tort remedy would not offer any protection for fourth amendment rights.

The article next focuses on the decision in *United States v. Williams*, and argues that the Fifth Circuit's three principal justifications for adopting the good faith exception are invalid. First, it will demonstrate that the good faith exception does not affect merely the exclusionary rule, but rather diminishes the protections of the fourth amendment itself. It will then show that the exception strips the exclusionary rule of an important deterrent effect by permitting the introduction of illegally-seized evidence in situations when the rule would operate as a "general" or "systemic" deterrent. Finally, it will argue that the exception is not consistent with precedent, and is in fact contrary to several recent Supreme Court decisions, as well as the principles upon which the Court has traditionally resolved fourth amendment issues.

The article uses the *Williams* decision to illustrate the theoretical limitations of the good faith exception, and to highlight the tension and contradictions that the exception will cause in practice. A distressingly broad range of misconduct will be excused under the good faith exception, for use of the exception almost surely will change the fourth amendment standard for searches and seizures from probable cause to general reasonableness.

Finally, the article comments on how *Williams* mirrors a subtle, but revealing, shift in the criticism leveled at the exclusionary rule by its opponents.

Where formerly the rule was attacked because it failed to deter unlawful police conduct, now it is attacked because it deters unlawful conduct all too well. These opponents of the rule should be more candid: they should not mask their objection to an interpretation of the fourth amendment as an attack on the exclusionary rule.

II. *WILLIAMS* IN HISTORICAL PERSPECTIVE

Like most other provisions of the Bill of Rights, the fourth amendment is not self-executing;[40] it simply recognizes that the people have a right to be secure from unreasonable searches and seizures.[41] The first clause of the amendment commands that this right "shall not be violated," and the second requires that warrants "shall issue" only when specifically limited in scope and supported by a minimum quantum of evidence—probable cause.[42] Nowhere does the fourth amendment prescribe, however, what consequences must follow from a search or seizure that is either unreasonable or conducted in violation of the warrant requirement.

Thus, if the fourth amendment's protections are to be enforced, they require a remedy that will guarantee the rights granted by its language. Because the amendment itself provides no enforcement mechanism, a court called upon to enforce the amendment's protections apparently would have to resolve two separate issues. First, it would have to determine whether a fourth amendment violation had occurred. This determination would require the court to delineate the contours of the right itself, not only by analyzing the relationship between the amendment's two main clauses,[43] but also by giving content to its

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40. It was many years before the courts developed mechanisms to enforce most of the provisions of the Bill of Rights. The fourth amendment, like the other provisions, did not even arguably apply to the states until the fourteenth amendment was adopted in 1868, *see* Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855) (Constitution restrains only issuance of warrants under federal law and has no application to state process), and during the nineteenth century there were relatively few federal criminal prosecutions. *See* note 47 *infra* and accompanying text. Moreover, the Supreme Court did not take much interest in state criminal prosecutions until the 1930's. Thus, the fact that the exclusionary rule was not formulated until 125 years after the Constitution's ratification, and not applied to the states until 1961, should be of little significance in assessing its legitimacy or its value. *See* Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 74-75 (1978) (discussing relatively recent development of remedies for constitutional violations).

41. *See* note 2 *supra* (text of fourth amendment).

42. *Id.*

43. In attempting to define the relationship between these two clauses, the Court has misread the amendment's history. The Court has suggested that the purpose of the warrant clause was to establish a procedural mechanism for safeguarding individual privacy rights; that is, as a way of minimizing the likelihood that the unreasonable searches prohibited by the first clause will occur. *See generally* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-46 (1969). History demonstrates, however, that the seeds of the fourth amendment, first sown in England and then transplanted to the colonies, grew out of a fear of arbitrary searches and seizures conducted pursuant to "general warrants," which authorized their bearers to search broadly and at will for evidence of crime. *Id.* at 38-44. In eighteenth-century England, the typical purpose of the general warrant was to root out those suspected of seditious libel. *Id.* at 25-26. The two leading pre-revolutionary English cases striking down such warrants were Wilkes v. Wood, 19 Howell's State Trials 1153 (1763), and Entick v. Carrington, 19 Howell's State Trials 1029 (1765). The English exported these general warrants to the colonies in the form of writs of assistance, which the King's customs officials used widely to search private premises and seize smuggled goods. T. TAYLOR, *supra*, at 35-36. These searches and seizures, made pursuant to such general warrants, constituted the evil at which the framers directed the protections of the fourth amendment. *Id.* at 38-43.

This intent is evident from the original draft of the amendment, which reads: "The right of the

essential terms: "search," "seizure," "unreasonable," and "probable cause."[44]

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people to be secured [sic] in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." 1 ANNALS OF CONGRESS 783 (1789), *quoted in* 1 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 1.1, at 5 (1978) [hereinafter LAFAVE, SEARCH AND SEIZURE]. A substantial majority of the delegates voted down the amendment as originally proposed. *Id.* Nevertheless, Representative Benson, the author of the rejected language, succeeded in sneaking his language back into the proposed amendment and the full Congress approved it in that form. *Id.* For a thorough account of the origins of the fourth amendment, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1970).

Although the Court has misread the fourth amendment's history with respect to the purpose of the warrant clause, it has, in light of that history, correctly interpreted the probable cause requirement of the amendment as establishing the threshold test for reasonableness of searches and seizures made with or without a warrant. *See* note 44 *infra* (arguing that probable cause is prerequisite to fourth amendment reasonableness). Fearful of both the arbitrariness and the breadth of the writs of assistance, the framers adopted the fourth amendment with a dual intent: the purpose of the probable cause requirement was to ensure that searches and seizures had an adequate basis in fact; the purpose of the particularity requirement was to guarantee that they were limited in scope to the persons or things to be seized.

44. The thesis of this article rests in part on the premise that probable cause is a prerequisite to fourth amendment reasonableness, at least in the context of arrests and most searches (as opposed to stops and frisks). The Supreme Court has stated clearly and repeatedly that probable cause is required to support an arrest or, with few exceptions, a search. *E.g.,* United States v. Watson, 423 U.S. 411, 423-24 (1976); Carroll v. United States, 267 U.S. 132, 162 (1925), *cited with approval in* Brinegar v. United States, 338 U.S. 160, 175-76 (1949); *see* note 118 *infra* (discussing exceptions). Although the framers did not intend the warrant clause to act as a procedural mechanism for preventing unreasonable searches and seizures, they apparently did intend to forbid all searches and seizures made without probable cause. *See* T. TAYLOR, *supra* note 43, at 38-44. At the time of the amendment's adoption, no officials in this country or in England even contemplated entering and searching a house without a warrant. Although arrests could be made in public without a warrant, they had to be based on probable cause. This requirement raised no problems, however, because at that time arrests almost invariably were made after hot pursuit or following a hue and cry, and so were supported by very strong evidence. *Id.* at 27-29. Warrantless searches incident to arrest apparently were routine and did not evoke the fear or concern that accompanied the exercise of the general warrant. *Id.* at 27-29, 39, 43. Thus, searches made pursuant to general warrants issued on less than probable cause were not only what the framers feared most, they were, generally speaking, the only non-probable cause searches and seizures likely to occur at that time.

Surely only a bizarre interpretation of the amendment, either as adopted or proposed, would yield the anomalous result of on the one hand requiring probable cause for the issuance of a warrant, and yet on the other hand permitting warrantless searches on less than probable cause. To its credit, the Supreme Court plainly has rejected any such interpretation. *See* Wong Sun v. United States, 371 U.S. 471, 479 (1963) (whether or not requirements of reliability or particularity of information on which officer may act are more stringent when warrant absent, they surely cannot be less stringent than when warrant obtained); Henry v. United States, 361 U.S. 98, 104 (1959) (although *Carroll* relaxed requirements for warrant on grounds of practicality, did not dispense with need for probable cause); *cf.* Dunaway v. New York, 442 U.S. 200, 208 (1979) (probable cause standard represents accumulated wisdom of precedent and experience and defines minimum justification necessary to make amount of intrusion involved in arrest "reasonable" under fourth amendment); Brinegar v. United States, 338 U.S. 160, 176 (1949) ("long-prevailing" standard of probable cause embodies best compromise for accommodating often opposing interests in safeguarding citizens from rash and unreasonable interferences with privacy and in "seeking to give fair leeway for enforcing the law in the community's protection"). *See also* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.1, at 439; J. LANDYNSKI, *supra* note 43, at 42-43; Saltzburg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 159-63 (1980).

In a forthcoming article, Professor Posner argues that the exclusionary rule should be scrapped, and that the fourth amendment should be viewed simply as subjecting the police (and their governmental employers) to tort liability for unreasonable searches and seizures. R. Posner, Rethinking the Fourth Amendment 1-2 (Sept. 22, 1981) (unpublished) (copy on file at *Georgetown Law Journal*). Under Posner's approach, a search or seizure would not be unreasonable simply because it was made without probable cause; rather, the test in all cases would be whether the benefits to society reasonably expected to flow from the search and seizure outweighed the anticipated costs to legitmate privacy interests. *Id.* at 26-32. A criminal's interest in avoiding detection and conviction for his commission of a crime

Second, the court would need to decide what consequences should attach when the government carries out an unreasonable search, however defined. Although such a two-step inquiry might seem to have been required, the Supreme Court, in its early encounters with the provision, did not divide its analysis in this manner. Only within the last thirty years has the Court bifurcated its fourth amendment analysis into two distinct inquiries.[45]

For almost 125 years after the adoption of the Bill of Rights, the courts entertained virtually no suits, either civil or criminal, brought under the fourth amendment. During that period, the amendment applied only to the federal government,[46] which in those simpler times had few laws and only a small contingent of agents to enforce them.[47] Even at the state and local levels, the first organized police forces did not appear until well into the nineteenth century.[48] Moreover, there were, of course, no telephones to tap or electronic bugs

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would not be counted as such an interest. *Id.* at 4-5. Moreover, Posner would apparently impose no constitutional limits on the legislative power to authorize arrests or searches (as long as they were warrantless!) on less than probable cause. *Id.* at 30-32. In other words, the legislature could, consistent with the Constitution, empower the police to search, arrest, and interrogate on the slightest suspicion. The victim of a particular search, however, would still be entitled to relief in a tort action if he could show that the search was "unreasonable" because its anticipated costs to privacy interests outweighed the anticipated benefits to society. Posner suggests that these costs and benefits would then be weighed by the jury.

There are both practical and doctrinal defects in this proposal. How, for example, are the aoristic benefits to society of apprehending someone who has committed a particular crime to be weighed by the police, and later the jurors? Are they to consider, and put a monetary value on: the likelihood and severity of future criminal conduct by the suspect, the likelihood of his rehabilitation if he is apprehended, the gain in general deterrence if he is caught, the demoralization costs to the victim and others if he is not caught, and so on? Can we really trust the police and juries to put a value on other people's privacy, particularly when those who are most likely to be subject to coercive and intrusive police action are members of minority groups, and thus are least able to protect themselves through the political process?

Moreover, because society collectively determines what conduct should be made criminal and the "seriousness" of particular crimes, it is hard to see why, on a purely cost-benefit analysis, the Constitution should be seen as imposing any anti-majoritarian limits on the legislature's power to authorize coercive police conduct aimed at preventing crime. Indeed, even the third degree may be reasonable, that is, cost-effective, on some occasions. The reason that a simple majority cannot institute a police state is not that it is uneconomic, but rather that it is prohibited by provisions of the Bill of Rights, most importantly by the fourth amendment.

Posner contends, however, that the probable cause requirement of the warrant clause does not stand in the way of his proposal, arguing that the clause should not be read as setting the standard for arrests and searches without a warrant. *Id.* at 30. He maintains that the warrant clause would not be superfluous even if its specific requirements did not apply to warrantless searches because the police still would need a common law or statutory basis to make a warrantless arrest or search. *Id.* at 28 n.56. The warrant clause, on this reading, simply ensures that where the basis for the arrest or search is a warrant, the requirements of the warrant clause will be met. Posner also argues that the clause prevents the police from "a more secure defense of legal process" where a search is conducted pursuant to a warrant. *Id.* This fails to explain, however, why the warrant clause should require a fixed quantum of proof—probable cause—to support a warrant, if the reasonableness requirement of the first clause does not also presuppose probable cause for warrantless searches or seizures. Posner recognizes that the acceptance of his interpretation will depend on the weight given to the principle of stare decisis in the fourth amendment area. *Id.* at 2.

45. The Court first undertook this bifurcated analysis of fourth amendment questions in Wolf v. Colorado, 338 U.S. 25, 28-32 (1949).

46. The fourth amendment was not applied to the states until Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

47. *See* California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) (list of federal criminal statutes has greatly expanded).

48. The modern police system originated in 1829 when Sir Robert Peel, as Home Secretary, initiated a new metropolitan constabulary pursuant to a Parliamentary Bill authorizing the action. V. FOLLEY, AMERICAN LAW ENFORCEMENT 61 (1980). The new force stressed discipline, semi-military organiza-

to plant. Nineteenth-century law enforcement officers could not base their arrests on other standard twentieth-century investigative techniques such as fiber analysis, photographic identifications, or information transmitted by police radio. Instead, arrests were almost invariably made on or near the scene of the crime in response to a "hue and cry,"[49] and there were few fourth amendment challenges to police determinations of probable cause.[50]

The turn of this century, however, brought a rapid proliferation of federal criminal laws, and with it, a vast increase in the number of searches, seizures, and federal criminal prosecutions.[51] Increasingly, defendants sought to preclude the government from using against them evidence obtained through allegedly unconstitutional searches or seizures conducted by its agents. Thus, both the task of defining the scope of fourth amendment rights and of determining how such rights were to be enforced arose in the context of federal criminal prosecutions.

It was in this context that the Supreme Court, rebelling against the notion that it should sanction unconstitutional searches, ruled that the government may not use evidence obtained through the misconduct of its agents. When this "exclusionary rule" was first formulated in *Weeks v. United States*,[52] it was

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tion and operation, and high-quality staff. *Id.* Headquartered on a small side street called "Scotland Yard," the constables' effective operation quickly gained the esteem and respect of an initially wary public. *Id.* at 62-63. The members of the force soon became known as "peelers" or "bobbies" out of respect for Sir Robert Peel. *Id.* at 63.

The first American police officers were parish constables, appointed during colonial rule. *Id.* at 67. Because America was predominantly rural until the twentieth century, municipal police departments grew slowly. Initially, cities were concerned primarily with security during the evening hours, and as they grew, they established routinized night watches. *Id.* at 67-68. Boston founded the first night watch in 1636, with similar forces arising in New York in 1658, and in Philadelphia in 1700. *Id.* at 70. Not until the mid-1800s did American cities, following the British pattern, institute daytime police patrols. *Id.*

49. W. SHEPPARD, THE OFFICES OF CONSTABLES ch. 8, § 2, no. 4 (London, c. 1650), *quoted in* T. TAYLOR, *supra* note 43, at 39.

50. Until fourth amendment privacy was held to be enforceable against the states in Wolf v. Colorado, 338 U.S. 25 (1949), fourth amendment "probable cause" issues could only arise when federal officials were involved or under state constitutions with a probable cause requirement. *Id.* at 28.

51. Prior to the turn of the century, only three cases contesting substantive fourth amendment issues reached the Supreme Court. This may have occurred simply because the Court's appellate jurisdiction was not expanded to include any criminal cases until 1891. *See* 26 Stat. 826, § 5 (1891) (conferring Supreme Court jurisdiction over "cases of conviction of a capital or otherwise infamous crime"). *See also* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3503, at 8 (1975) (no Supreme Court review of federal criminal cases under Judiciary Act of 1789). Of the 25 cases involving searches and seizures that the Supreme Court decided between *Weeks* and the repeal of prohibition in 1933, 24 of them involved gambling, bootlegging, or narcotics offenses. Harris v. United States, 331 U.S. 145, 175-81 (1947) (Frankfurter, J., with Murphy & Rutledge, JJ., dissenting).

52. 232 U.S. 383 (1914). Among the items seized were books, letters, bonds, mining certificates, an old newspaper, clothes, candy, and a tin box. *Id.* at 387. The property was taken by the government to be used for evidence in its prosecution of the defendant for unlawful use of the mails to transmit lottery tickets. *Id.* at 388. Only the letters, however, were introduced at trial. *Id.* at 394.

Weeks was the first case in which the Court excluded evidence solely on fourth amendment grounds. In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court excluded evidence acquired in violation of the defendent's fourth and fifth amendment rights. *Id.* at 633-35. The Court held unconstitutional a statute that forced a person to produce, upon court order, any document that might tend to prove a non-criminal allegation by the government of the violation of a revenue law, or else have the allegation taken as confessed. *Id.* Although the law technically applied to civil proceedings, the Court found that it fell within the fourth and fifth amendments because its provision for forfeiture and penalties were of a quasi-criminal nature. *Id.* at 634. The Court grouped the fourth and fifth amendments

not a consciously-chosen device for deterring fourth amendment violations.[53] Rather, it was simply the the natural outgrowth of the prevalent form of litigation, federal criminal prosecutions, which consistently raised fourth amendment issues.

There were several distinct normative principles underpinning the *Weeks* exclusionary rule: first, that it was simply unfair to convict a defendant on the basis of evidence unlawfully seized from him;[54] second, that it was an addi-

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together because "the seizure of a man's private books and papers against him is [not] substantially different from compelling him to be a witness against himself." *Id.* at 633.

Before *Weeks*, only one state excluded evidence obtained in violation of a state constitutional provision prohibiting unreasonable searches. State v. Sheridan, 121 Iowa 164, 96 N.W. 730 (1903), *cited in* Wolf v. Colorado, 338 U.S. 25, 34 app. (1949). In the 35 years between *Weeks* and *Wolf*, 16 states chose to follow the *Weeks* rule, while 30 states rejected it. Wolf v. Colorado, 338 U.S. at 29.

Otherwise admissible evidence may also be excluded for other reasons, for example: (1) to protect the defendant's fifth amendment privilege against self-incrimination, *see* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (accused must be effectively apprised of rights during in-custody interrogations to combat inherent pressures to incriminate himself); Rogers v. Richmond, 365 U.S. 534, 543-44 (1961) (admissibility of defendant's confession dependent upon whether law enforcement officials compelled confession, not upon truthfulness of confession); (2) to protect the defendant's sixth amendment right to counsel, *see* Brewer v. Williams, 430 U.S. 387, 394-95, 406 (1977) (affirming exclusion of evidence obtained through self-incriminatory statements elicited in violation of defendant's right to counsel); (3) to safeguard a defendant's due process right to avoid conviction based on unreliable identification, *see* Manson v. Brathwaite, 432 U.S. 98, 112-14 (1977) (reliability of identification assessed by examining totality of circumstances); Stovall v. Denno, 388 U.S. 293, 302 (1967) (due process denied by confrontation unmistakably suggestive and conducive to mistaken identity); (4) to protect rights created by state constitutional provisions, *see* State v. Kaluna, 55 Hawaii 361, 369-71, 520 P.2d 51, 58-59 (1974) (protections of Hawaii Bill of Rights can be extended beyond parallel provisions of federal Bill of Rights; affirming order suppressing drugs seized in pre-incarceration search for weapons because packet containing drugs searched out of curiosity); (5) to ensure rights mandated by a federal statute, *see* 18 U.S.C. § 2515 (1976) (prohibiting use of evidence seized outside scope of statutory scheme regulating wiretapping); or (6) as an exercise of a court's supervisory powers. *See* McNabb v. United States, 318 U.S. 332, 341-42 (1943) (evidence acquired through involuntary confession excluded in exercise of Court's supervisory authority over administration of criminal justice in federal courts).

This article is concerned only with the exclusion of evidence obtained in a search or seizure that violated the fourth amendment to the United States Constitution, and the term "exclusionary rule" shall be used to refer only to such evidence.

53. Justice Holmes summarized the premise behind an exclusionary policy in a simple proposition: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired should not be used before the Court, but that it should not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). During its early stages, the reach of the exclusionary rule was broad. In *Silverthorne*, for example, the Court held invalid grand jury subpoenas because they were based on knowledge obtained from illegally-seized evidence. *Id.* at 392.

54. *See generally* Schrock & Welsh, *supra* note 34, at 257-60. Founding their position upon a "unitary model" of government, the authors stress that a court's admission of evidence derived from the improper conduct of police makes the judiciary "vicariously responsible" for the executive's wrong. *Id.* at 258, 260. The entire government has thus denied a "fair prosecution" to a defendant. *Id.* at 258. The authors rely mostly upon the dissenting opinions of Justices Holmes and Brandeis in *Olmstead v. United States*. *See* note 56 *infra*. They argue, however, that those dissenting opinions merely make "vivid the unitary thinking pioneered in *Weeks*." Schrock & Welsh, *supra*, at 258 n.25.

Even among judges who at other times may have expressed skepticism about the exclusionary rule, this "unitary thinking" may have its appeal. In Crews v. United States, 369 A.2d 1063 (D.C. 1977), *rev'd*, 389 A.2d 277 (D.C. 1978) (en banc), *rev'd*, 445 U.S. 463 (1980), Judge Stanley S. Harris noted both the "social costs" of the exclusionary rule, and its "limited efficacy" as a deterrent. *Id.* at 1069 n.7. Recently, in Smith v. Whitehead, No. 79-526 (D.C. Sept. 10, 1981), Judge Harris dissented from the majority's affirmance of a jury award of damages in an action in conversion that was brought against several police oficers. The officers, while executing a search warrant for drugs and evidence of drug dealing, seized large numbers of household items from a private home. *Id.*, slip op. at 3-5. Because the officers, whether or not correctly, believed that the property had been received as payment for drugs, and hence could be used as evidence in court, Judge Harris concluded that the police lacked the intent necessary for conversion. *Id.* at 35 (Harris, J., dissenting). In his view, they were merely acting as agents of the judiciary. He wrote: "As officers seizing items pursuant to a search warrant, they acted on

tional unlawful invasion of his privacy to admit such tainted evidence at his trial;[55] third, that the government should not be able to profit from the wrongdoing of its agents;[56] and fourth, that the integrity of the federal courts should not be compromised through the admission of unlawfully-seized evidence.[57]

As long as the fourth amendment governed only the conduct of federal officials, these principles coexisted harmoniously, and the Court had no need to consider their relationship. When the Court attempted to apply the fourth amendment to the states, however, this harmony was shattered. The dissonance resulted from the Court's severing the inquiry into whether the government had violated the defendant's fourth amendment rights from that of whether to apply the exclusionary rule.

In *Wolf v. Colorado*,[58] the Supreme Court for the first time ruled that the core value protected by the fourth amendment—"the security of one's privacy

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behalf of the court which authorized the warrant. . . . [T]hey intended merely to seize evidence on behalf of the court for possible use in a criminal prosecution." *Id.* (citation omitted). If the police are judicial agents when they conduct seizures—at least those pursuant to a warrant—then the illegal conduct of the police should be imputed to the courts, unless they disavow the officers' actions through exclusion of evidence. Thus, Judge Harris has unwittingly articulated the philosophical basis for a theory of the exclusionary rule not grounded on deterrence.

55. The early exclusionary rule cases generally involved the illegal seizure of private papers. *See, e.g.,* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (grand jury subpoena based on illegally-seized papers held invalid); Weeks v. United States, 232 U.S. 383, 398 (1914) (letter seized illegally from defendant by federal official without warrant); Boyd v. United States, 116 U.S. 616, 638 (1886) (notice to produce invoices held erroneous and unconstitutional). Exclusion of evidence to preserve personal privacy, however, lost much of its appeal as evidence challenged by motions to suppress tended increasingly to be either contraband or stolen property. This precept was explicitly rejected by the Court in United States v. Calandra, 414 U.S. 338, 347 (1974) (purpose of exclusionary rule not to remedy invasions of individual privacy, but rather to deter future unlawful police conduct). *See* notes 95-98 *infra* and accompanying text (discussing *Calandra*).

56. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (government prevented not only from presenting unlawfully seized papers in evidence against defendant, but also from using information acquired from papers). In his dissent in *Olmstead v. United States*, Justice Brandeis wrote what is perhaps the most memorable statement of this principle:

> If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In a separate opinion, Justice Holmes agreed with Justice Brandeis that the government should not profit from its criminal acts: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470 (Holmes, J., separate opinion).

57. The *Weeks* Court stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting the accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392. After the fourth amendment was applied to the states, the Court relied on the "imperative of judicial integrity" to prevent the introduction of evidence, unlawfuly seized by state officials. *See* note 75 *infra* and accompanying text.

58. 338 U.S. 25 (1949). Though you would not know it from the five rather abstract and antiseptic opinions that the sharply divided Supreme Court produced in *Wolf*, the case involved the prosecution of a physician for conspiracy to commit abortion. The evidence against him included appointment books seized from his office. Wolf v. People, 117 Colo. 279, 281, 187 P.2d 926, 927 (1947), Wolf v. People, 117 Colo. 321, 322, 187 P.2d 928, 929 (1947), *aff'd*, 338 U.S. 25 (1949).

against arbitrary intrusion by the police"[59]—was "implicit in the concept of ordered liberty and as such enforceable against the states through the Due Process Clause" of the fourteenth amendment.[60] The Court ruled, however, that the Constitution did not require a state to enforce this right through the exclusionary rule.[61] Although the Court had originally considered the rule an essential ingredient of the fourth amendment, the majority in *Wolf* reduced the status of the rule to merely "a matter of judicial implication,"[62] and "remanded" those defendants aggrieved by unconstitutional police conduct to "such protection as the internal discipline of the police, under the eyes of an alert public opinion may afford."[63]

The Court's analysis in *Wolf* introduced new concepts that created intolerable tensions between state and federal law.[64] To begin with, by applying the fourth amendment to the states, the Court greatly extended the range of government officials subject to the fourth amendment and concomitantly expanded the right of people to be secure from unreasonable searches and seizures. At the same time, however, the Court left to the police themselves the responsibility for seeing to it that those rights were respected. In short, the Court created rights, but provided no remedy for their enforcement.

Moreover, the Court for the first time injected the instrumental rationale of deterrence of police misconduct into its discussion of the exclusionary rule.[65] At the same time, however, it made clear that it did not view this rationale as compelling.[66] Furthermore, by using the empirically-based, consequentialist rationale of deterrence as support for its refusal to apply the exclusionary rule to the states, the Court necessarily undercut one normative theme of the rule: that the accused has a personal due process right not to be convicted with evidence seized from him in violation of the Constitution. For if there were such a right, it should be equally available to state and federal defendants, all

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59. 338 U.S. at 27.

60. *Id.* at 27-28. The Court did not incorporate at once the whole of the fourth amendment into the fourteenth amendment. The Court in *Wolf* took the first step. The range of the fourth amendment interests encompassed by *Wolf* remained unclear, however, until the Court ruled in Ker v. California, 374 U.S. 23 (1963), that the fourth amendment applied with full force to the states, and that the constitutional standards governing federal officials also apply to state officials. *Id.* at 33. Until it extended the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961), there were simply no cases requiring the Court to elucidate just what constraints the fourth amendment imposed on state officials through the fourteenth amendment. This tends to bear out the thesis of this article: without the exclusionary rule, the contours of the fourth amendment remain undeveloped.

61. 338 U.S. at 33. Prior to *Wolf*, several states had provisions similar to the fourth amendment. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 132-33 (1973). Some of these states enforced their fourth amendment surrogates with judicially-created exclusionary rules. *See* Wolf v. Colorado, 338 U.S. at 34-38 (Tables B, D, F, I) (setting forth cases in which states adopted exclusionary enforcement measures). By leaving enforcement of the fourth amendment to the states, *Wolf* did not alter the states' practices regarding the exclusionary rule.

62. 338 U.S. at 28.

63. *Id.* at 31.

64. *See* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 5 (*Wolf* contained "seeds of its downfall"; Court recognized broad federal right but relegated it to "tender mercies" of states for enforcement).

65. 338 U.S. at 31.

66. Although the Court recognized that "in practice the exclusion of evidence may be an effective way of deterring unreasonable searches" it concluded that "incidence of such conduct by [state] police [may be] too slight to call for" the remedy of exclusion, and that the "public opinion of a community" may exert sufficient influence on the police. *Id.* at 31-32.

of whom enjoy the protections of due process. Thus, by driving a wedge between the fourth amendment and the exclusionary rule, the Court in *Wolf* dealt the rule a blow from which it has never recovered. Although the Court said that it "stoutly adhere[d] to" the exclusionary rule of *Weeks*,[67] it never adequately explained why, if the rule was unnecessary for the enforcement of fourth amendment rights in state courts, it was indispensible in federal courts.

The tension implicit in *Wolf* soon became unbearable. As the federal courts continued to expand the range of fourth amendment protections in the course of deciding exclusionary rule cases, the gap between federal and state privacy rights began to widen. In those states whose courts did not apply the exclusionary rule, the privacy rights protected by the fourth and fourteenth amendments remained undeveloped. As a result, while federal law enforcement agencies responded by modifying investigatory practices to conform to evolving fourth amendment standards, in states without an exclusionary rule egregious and premeditated official misconduct continued; neither the "internal discipline" of the police nor "the eyes of an alert public opinion" proved sufficient to protect those most likely to be victimized by police lawlessness.[68] Several states adopted the exclusionary rule on their own initiative,[69] realizing that if the command of the Constitution was to be enforced against state officers, it would have to be enforced through the exclusionary rule.

Even in the Supreme Court, the erosion of *Wolf* began almost as soon as it was announced.[70] In *Rochin v. California*,[71] the Court held that an exclusionary rule, grounded in the due process clause of the fourteenth amendment, applied in state criminal prosecutions to evidence obtained through police misconduct "so brutal and so offensive to human dignity"[72] that it "shocks the

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67. *Id.* at 28.

68. *See* Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 323-24 (prior to *Mapp*, fourteenth amendment search and seizure guarantees were not protected by states). In states without an exclusionary rule, defendants had no way to object to the admission of evidence on the ground that it had been seized in violation of their fourth amendment rights. Some particularly offensive seizures, however, were challenged on due process grounds. One such case was Irvine v. California, 347 U.S. 128 (1951). In *Irvine*, the defendant sought suppression of evidence obtained by the police when they bugged his home. Acting without a search warrant or probable cause, the police had made repeated covert entries into Irvine's home and had concealed microphones in various places with the hope that they would overhear incriminating statements. *Id.* at 131. In one instance, the transmitter was placed in the defendant's bedroom. *Id.* The Supreme Court affirmed the petitioner's conviction: because there had been no coercion, there was no denial of due process. *Id.* at 133, 138 (plurality opinion). At the suggestion of Justice Jackson and Chief Justice Warren, *id.* at 138, the FBI investigated the case for possible federal prosecution of the officers. The investigation revealed that the officers had been acting under orders of the Chief of Police and with full knowledge of the local prosecutor. Note, *State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute*, 7 STAN. L. REV. 76, 94 n.75 (1954). It was cases like *Irvine* that led the California Supreme Court to adopt the exclusionary rule in People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). *See* Traynor, *supra*, at 324 (in period between *Irvine* and *Cahan* it became clear that California had to adopt exclusionary rule).

69. *See* Elkins v. United States, 364 U.S. 206, 224-32 (1960) (listing state court decisions on admissibility of unlawfully-seized evidence); People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955) (adopting exclusionary rule in California).

70. *See generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 629 (Supreme Court made inroads into *Wolf* just a few years after it was decided). Mr. Geller's article provides an excellent discussion of the arguments that have been made for and against the exclusionary rule.

71. 342 U.S. 165 (1952).

72. *Id.* at 174.

conscience."[73] Soon thereafter, in *Elkins v. United States*,[74] the Court forbade the use in federal prosecutions of evidence unlawfully seized by state police officers, thereby rejecting the "silver platter doctrine."[75] Notably, *Elkins* was the first case to be decided explicitly on the deterrence rationale.[76]

Ultimately, in *Mapp v. Ohio*,[77] the Court tried to repair the damage by overruling *Wolf* and applying the exclusionary rule to the states.[78] Yet where the

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73. *Id.* at 172. In *Rochin*, three Los Angeles deputy sheriffs entered Antonio Rochin's home through an open outside door during the course of a narcotics investigation. *Id.* at 166. The officers forced open a bedroom door and found Rochin and his wife. *Id.* The officers saw two capsules on a night stand. *Id.* When the deputies asked "Whose stuff is this?" Rochin grabbed the capsules and swallowed them. *Id.* The three officers unsuccessfully tried to extract the capsules from Rochin's mouth. *Id.* They then handcuffed Rochin and took him to a hospital. *Id.* At the direction of one of the officers a doctor forced a tube down Rochin's throat against Rochin's will, and funneled an emetic solution into his stomach inducing vomiting. *Id.* Two capsules were recovered from the vomit, and were found to contain morphine. *Id.*

Though it decided *Rochin* on due process grounds, the Court for the first time applied an exclusionary rule to tangible evidence seized by state officials. Cases coming soon after *Rochin* demonstrated the difficulties with the "shocks the conscience" test. *See* Breithaupt v. Abram, 352 U.S. 432, 437 (1957) (blood test taken while suspect unconscious does not shock conscience); Irvine v. California, 347 U.S. 128, 133 (1954) (*Rochin* involved element of physical coercion—use of stomach pump—not found in illegal surveillance of defendant's home).

Justice Frankfurter, who authored the opinions in both *Rochin* and *Wolf*, dissented in *Irvine*. 347 U.S. at 142 (Frankfurter, J., with Burton, J., dissenting). *Irvine* may have made the demise of *Wolf* inevitable, because to many, it demonstrated the ineffectiveness of diluted forms of the *Weeks* exclusionary rule. *See* Traynor, *supra* note 68, at 324 (decision in *Irvine* evinced Supreme Court's desire for states to implement an exclusionary rule).

74. 364 U.S. 206 (1960).

75. *Id.* at 223. In Byars v. United States, 273 U.S. 28 (1927), the Court had ruled inadmissible in a federal prosecution the fruits of a search conducted by state and federal officers pursuant to a state search warrant that was defective by federal standards. *Id.* at 29-30. Nevertheless, the Court made it clear that participation by federal officials was crucial to the decision. The Court did "not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *Id.* at 33. According to Justice Stewart's majority opinion in *Elkins*, the Court had removed the doctrinal underpinning for admitting evidence unlawfully seized by state officials in federal prosecutions in *Wolf*, when it held that the fourth amendment prohibition against unreasonable searches and seizures applied to the states through the fourteenth amendment. *Id.* at 213. Justice Stewart wrote:

> For by admitting the unlawfully seized evidence the federal court serves to defeat the state's [that adopted the exclusionary rule on its own] effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with the local policy for a federal court to decline to receive evidence unlawfully seized by state officers.

Id. at 221. Justice Frankfurter, the author of *Wolf*, dissented. He viewed it as:

> [A] complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a . . . search unreasonable under the Fourth Amendment, constitutes an "arbitrary intrusion" of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment.

Id. at 238 (Frankfurter, J., with Clark, Harlan & Whittaker, JJ., dissenting).

76. *Id.* at 217. The Court stated: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.*

77. 367 U.S. 643 (1961).

78. *Id.* at 655. The Court reasoned that:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be a "form of words," valueless and undeserving of mention in a perpetual

Court had once perceived a kind of natural, immutable affinity between the fourth amendment and the rule, since *Wolf* the Court has seen the relationship between them as the product of judicial artifice, and the rule itself as a judicial construct requiring explicit, pragmatic justification if it is to survive. Thus, although the Court in *Mapp* invoked a concatenation of normative principles to support the extension of the exclusionary rule to the states,[79] the bulk of its opinion was devoted to a defense of the rule on the empirical basis that it has proved to be the only effective means of enforcing the fourth amendment.

Soon after *Mapp*, the Court identified deterrence as the preeminent purpose of the exclusionary rule. In *Linkletter v. Walker*,[80] the Court declined to apply *Mapp* retroactively:[81] "The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. . . . [T]he ruptured privacy of the victims' homes and effects cannot be restored."[82] Although after *Linkletter* deterrence was the dominant purpose of the rule, the Court nevertheless continued to recognize that it also served other purposes, and in *Terry v. Ohio*[83] ringingly proclaimed judicial integrity as a basis for the rule.[84]

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charter of inestimable human liberties, so too, without the rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus . . . .

Id.

79. In support of its application of the exclusionary rule to the states through the due process clause of the fourteenth amendment, the Court stated that the rule was a constitutional privilege and reasoned that no person should be convicted on unconstitutional evidence. *Id.* at 656-57. The Court further justified its application of the rule on the need to avoid a conflict between state and federal law produced when state courts admitted evidence that had been seized by federal officials in violation of the federal constitution. *Id.* at 657-58. The Supreme Court had already banned the use of evidence, seized by state officials in violation of the fourth amendment, in federal courts. *See* note 75 *supra* and accompanying text (discussing *Elkins'* rejection of "silver platter" doctrine). The Court also relied upon the "imperative of judicial integrity." *Id.* at 659 (citing Elkins v. United States, 364 U.S. 206, 222 (1960)). This rationale, however, could not justify application of the rule to the states through the due process clause of the fourteenth amendment. As long as they do not act unconstitutionally, state courts can presumably sully themselves with unlawfully-seized evidence without interference from a federal court.

80. 381 U.S. 618 (1965).

81. *Id.* at 621. Shortly after the Court's decision in *Mapp*, Linkletter, who had been convicted of burglary in Louisiana, sought habeas relief in both state and federal courts, arguing that he had been convicted on the basis of illegally-seized evidence. He appealed from the denial of his motion in district court, and the Fifth Circuit ruled that though his arrest and incident search were unconstitutional, the ruling in *Mapp* should apply only to convictions that had not become final prior to that decision. *Id.* The Supreme Court affirmed. *Id.* at 640. Justice Clark, who had authored *Mapp*, wrote for the Court:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Id. at 629.

In his discussion of the purpose of the *Mapp* rule, Justice Clark said "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action." *Id.* at 636.

82. *Id.* at 637.

83. 392 U.S. 1 (1968).

84. *Id.* at 12. Although the Court acknowledged that the exclusionary rule's "major thrust is a deterrent one," *id.*, it went on to say that "the rule also serves another vital function—'the imperative of judicial integrity.' Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.* at 12-13.

One year after *Terry*, the Court seemingly revitalized the principle that the exclusionary rule vindicates a personal right of the defendant when it reaffirmed its commitment to the fourth amendment standing doctrine[85] in *Alderman v. United States*.[86] Under this doctrine, a motion to suppress unconstitutionally seized evidence can be "successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."[87] This limitation on the range of defendants who can challenge unconstitutional police conduct by invoking the exclusionary rule makes sense only if the rule is conceived of as vindicating a personal right of the accused.[88] It is plainly inconsistent both with the notion that the rule's purpose is to prevent the government from profiting from its own wrongdoing,[89] and with the imperative of judicial integrity.[90]

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85. It is unclear whether "standing" continues as a threshold requirement to invoke the exclusionary rule. In Rakas v. Illinois, 439 U.S. 128 (1978), Justice Rehnquist noted that the question whether there has been a violation of the defendant's fourth amendment rights, which would activate application of the exclusionary rule to deter future violations, is the same question as whether the defendant has standing to make a motion to suppress. *Id.* at 140. Accordingly, the Court concluded that the "analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing." *Id.* In a 1980 case, United States v. Salvucci, 448 U.S. 83, 87 n.4 (1980), Justice Rehnquist confirmed that *Rakas* had abolished standing as a separate inquiry. *See also* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). He explained that he only used the term "standing" because the term was used in Jones v. United States, 362 U.S. 257 (1960), which the Court overruled in *Salvucci*. United States v. Salvucci, 448 U.S. at 87 n.4. In another 1980 case, United States v. Payner, 447 U.S. 727 (1980), however, Justice Powell still used the term "standing" to deny application of the exclusionary rule because the defendant's fourth amendment rights had not been violated. *Id.* at 731. Perhaps the explanation for this inconsistency is that the term "standing" will continue to be used as shorthand for whether the defendant can invoke the exclusionary rule, despite Justice Rehnquist's efforts to merge the inquiries into one.

86. 394 U.S. 165 (1969).

87. *Id.* at 171-72. The Court in *Alderman* rejected the argument that it should abolish the standing requirement to maximize deterrence because it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime . . . on the basis of all the evidence which exposes the truth." *Id.* at 174-75.

One commentator has suggested that an improper ex parte communication from then Attorney General John Mitchell to certain justices may have influenced the Court's decision in *Alderman*. Burkhoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 ORE. L. REV. 151, 155 n.16 (1979) (citing E. WARREN, THE MEMOIRS OF EARL WARREN 337-42 (1977)).

88. *See id.* at 162 (*Alderman* reaffirmed general rule that fourth amendment rights are personal; thus, individuals whose own rights not violated have no right to claim exclusionary remedy). Professor Amsterdam has argued that the fourth amendment should be viewed as regulating governmental conduct and not primarily as protecting "atomistic spheres of interest of individual citizens." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974). The standing limitation implies an atomistic conception that is inconsistent with the regulatory conception presupposed by the deterrence rationale.

89. In recent years the Court has not paid much attention to the rationale advanced in earlier decisions, such as Silverthorne v. United States, 251 U.S. 385 (1920), that the government should not be permitted to profit from the wrongdoing of its agents. *Id.* at 392. When government agents obtain evidence against the defendant by violating the fourth amendment rights of third parties, the Court's refusal to relax standing limitations to allow the defendant to invoke the exclusionary rule has the effect of allowing the government to profit from its agents' wrongs. Even though the agents' conduct might have been illegal, the Court has upheld the government's use of the evidence to convict the defendants. Rawlings v. Kentucky, 448 U.S. 98, 109-10 (1980); United States v. Payner, 447 U.S. 727, 735 (1980); Rakas v. Illinois, 439 U.S. 128, 150 (1978).

90. If the Court would not exclude evidence on the facts of United States v. Payner, 447 U.S. 727 (1980), when the government actually advised its agents to violate the fourth amendment, *see* note 91

Moreover, it is also fundamentally at odds with the deterrence rationale. If only the victim of the search can invoke the exclusionary rule, the police will have every incentive to invade the privacy of third parties in the hope of obtaining evidence against the target of their investigation.[91] Nevertheless, the Court in *Alderman* rejected the argument that it should abolish the standing requirement in order to increase deterrence.[92] The Court explained that any incremental deterrence would be too marginal to justify the cost to the public of suppressing probative evidence.[93]

Five years after *Alderman*, whatever life remained in the principle that the exclusionary rule vindicates a personal right of the accused was abruptly extinguished by the Burger Court[94] in *United States v. Calandra*:[95] "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search

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infra, it is hard to imagine that the Court would ever be provoked to utilize the "imperative of judicial integrity" as an independent basis for excluding unconstitutionally-seized evidence.

91. The recent case of *United States v. Payner* is illustrative. In *Payner*, the trial court made a finding of fact that the government "affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties." 447 U.S. at 730 (quoting United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977)). Under these circumstances, the application of the exclusionary rule would surely have had a deterrent effect on governmental practices calculated to obtain incriminating evidence by violating the fourth amendment. Nevertheless, even here the Court refused to relax the standing requirement. *See id.* at 735 (interest in deterring illegal searches does not justify exclusion of evidence at instance of party not victim of illegality); Alderman v. United States, 394 U.S. 165, 205-09 (1969) (Fortas, J., concurring in part and dissenting in part) (advocating doctrine of "target" standing). *See also* 3 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 11.3(h) (advocating standing for target of search); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 349-56 (1970) (same).

92. 394 U.S. at 174-75.

93. *Id.*

94. Even before he was elevated to the Supreme Court in 1969, Chief Justice Burger had been an outspoken critic of the exclusionary rule. *See* Smith v. United States, 324 F.2d 879, 881-82 (D.C. Cir. 1963) (per Burger, J.) (court admitted confessions made during illegal detention, refusing to make constitutional rules into "mere technical loopholes for the escape of the guilty") (quoting Stein v. New York, 346 U.S. 156, 196-97 (1953)); Wayne v. United States, 318 F.2d 205, 214 (D.C. Cir.) (per Burger, J.) (court upholds entry into apartment without warrant, rejecting notion of denying protection to society through "mechanical adherence to formalism"), *cert. denied*, 375 U.S. 860 (1963). *See generally* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964). Burger began his attack on the rule as Chief Justice in his dissenting opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *See* notes 517-30 *infra* and accompanying text (discussing evolution of Chief Justice Burger's position on exclusionary rule).

In *Bivens*, Chief Justice Burger dismissed all but the deterrent rationale for the exclusionary rule, then argued that the rule's history had demonstrated that it was "both conceptually sterile and practically ineffective in accomplishing its stated objective." *Id.* at 415 (Burger, C.J., dissenting). Burger also sowed the seeds of a good faith exception in this dissent, arguing that because the purpose of the rule was deterrence, its application should be limited to willful and intentional fourth amendment violations, and should not apply when the police make "honest mistakes," and "errors of judgment" that "inevitably occur under the pressure of police work." *Id.* at 418.

Ironically, Burger was dissenting in *Bivens* from a decision by the Court that victims of unconstitutional searches and seizures have a private, civil right of action under the constitution itself against federal officials who violate their fourth amendment rights. Burger, who has consistently advocated that the exclusionary rule be replaced by an effective tort remedy, dissented because he felt that it was for Congress, not the courts, to fashion such a right of action. *Id.* at 411-12.

95. 414 U.S. 338 (1974). The Court held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search because "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." *Id.* at 351. The Court distinguished *Silverthorne Lumber Co. v. United States* on tenuous grounds, noting that "the Court's broad dictum [in *Silverthorne*] has been substantially undermined in later cases." *Id.* at 352-53 n.8; *see* note 53 *supra* (discussing broad reach of exclusionary rule under *Silverthorne*).

victim," the Court wrote.[96] "Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures."[97] The Court then recast the rationale of the standing doctrine to suit its own purposes, relying on *Alderman* to hold that the exclusionary rule would not bar the use of illegally-seized evidence by a grand jury:

> Despite its broad deterrent purpose, the exclusionary rule . . . as with any remedial device . . . has been restricted to those areas where its remedial objectives are thought most efficaciously served. . . . Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. . . . This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.[98]

The Court thus misread *Alderman*, and its analysis of the standing doctrine is sophistical; the standing limitation was not "premised" on concerns with deterrence, but rather on what was thought to be the personal nature of the right to invoke the exclusionary rule, the very right that the Court in *Calandra* explicitly rejected. In *Alderman*, the Court mentioned deterrence only in responding to the argument that the right to exclude evidence should extend to all defendants.[99]

Despite its questionable reasoning, *Calandra* has set an analytical pattern that the Court has essentially followed ever since. The Court has thus divorced the exclusionary rule from the fourth amendment itself, and has installed deterrence as the rule's preeminent purpose. While the Court occasionally mentions its duty to preserve judicial integrity, that responsibility now requires no more than refusing to admit illegally-seized evidence when to do otherwise would encourage police misconduct.[100] Consequently, the Court

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96. 414 U.S. at 347. The Court also rejected the witness' claim that questions by the grand jury based on private papers seized illegally from him constituted distinct, independent violations of his fourth amendment rights:

> Grand jury questons based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally-obtained evidence are only a derivative use of the product of a past unlawful search or seizure. They work no new Fourth Amendment wrong.

Id. at 354.

97. *Id.*

98. *Id.* at 348.

99. 394 U.S. at 174-75. *See also* Jones v. United States, 362 U.S. 257 (1960), *overruled*, United States v. Salvucci, 448 U.S. 83 (1980), in which the standing doctrine is in no way linked to deterrence.

100. In United States v. Peltier, 422 U.S. 531 (1975), the Court noted that although previous decisions had "referred to 'the imperative of judicial integrity' . . . the Court has relied principally upon the deterrent purpose served by the exclusionary rule." *Id.* at 536 (citation omitted). Soon after *Peltier*, in Stone v. Powell, 428 U.S. 465 (1976), the Court stressed that the "imperative of judicial integrity" had played but a "limited role . . . in the determination whether to apply the rule in a particular context." *Id.* at 485. Nevertheless, it was in United States v. Janis, 428 U.S. 433 (1976), that the Court defined the judicial integrity rationale out of operative existence:

presently decides both federal and state cases from the perspective of putative deterrent effect alone.

One problem is that this formula, balancing the marginal increment in deterrence that would be achieved by applying the exclusionary rule in a collateral setting against the putative costs to society,[101] appears to be skewed.[102] Because the Court begins its analysis skeptical that the actual deterrent effect of the exclusionary rule can even be measured,[103] all cases seem to come out in

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> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the queston whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

Id. at 458 n.35.

This may sound harmless enough, but it is important to remember that in United States v. Calandra, 414 U.S. 338, 348 (1974), the Court had ruled that the accused has no personal constitutional right to have unlawfully-seized evidence excluded at trial. Therefore, because the Court "commits" no constitutional violaton by admitting illegally-seized evidence, judicial integrity comes into play only when the Court "encourages" constitutional violations.

Although under the *Janis* analysis the "imperative of judicial integrity" is functionally coextensive with the deterrence rationale, and will not, it appears, have any operative significance, it is worthwhile to recognize that the *Janis* formulation appears to "constitutionalize" deterrence. There now seems to be a constitutional requirement to impose the exclusionary rule in contexts where the failure to do so would demonstrably encourage unconstitutional police conduct.

This "requirement" could be the basis for an attack on the constitutionality of the good faith exception. Such an argument would begin with the language of the fourth amendment: "[T]he *right of the people to be secure* . . . against unreasonable searches and seizures shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added). The italicized words suggest that this is not simply an individual right to be free from unreasonable searches and seizures, but a right of the people of our society as a whole to enjoy a sense of confidence that their privacy will not be unnecessarily invaded by the government. This, in turn, imposes on all governmental institutions, and not just the police, the requirement that they act to ensure that the people can feel secure from unreasonable intrusions by government agents. As expressed in *Janis*, efforts to deter police misconduct are constitutionally mandated.

If we assume that the level of deterrence presently achieved by the exclusionary rule is constitutionally required, then inroads on the rule that would result in considerably more misconduct are unconstitutional unless other compensatory deterrent mechanisms are enacted. Such mechanisms are unlikely to come from legislatures, which "have not been, are not now, and are not likely to become sensitive to the concern of protecting [the privacy of] persons under investigation by the police. . . . [T]here will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control." Amsterdam, *supra* note 88, at 378-79. If this article is correct that a good faith exception will dilute the probable cause standard and stem the development of fourth amendment law, then such an exception diminishes the security to which each of us is entitled under the fourth amendment. Unless other measures will restore that level of security, the good faith exception is itself unconstitutional.

101. *See* notes 105-10 *infra* and accompanying text (discussing permissible uses of illegally-seized evidence).

102. Typically, the Court first suggests that the rule's impact on police conduct is uncertain even when its remedial objectives are thought to be most efficacious—in deterring police misconduct aimed at seizing evidence for the government's use in a criminal prosecution of the victim of the misconduct. Then, the Court reasons that even assuming the efficacy of barring this use of the evidence, the additional, marginal deterrent effect produced by forbidding the use of the evidence in some collateral way surely does not outweigh the cost to society in terms of law enforcement or the search for truth.

103. In *Elkins*, the Court recognized that "it is hardly likely that conclusive factual data could ever be assembled" that would demonstrate the deterrent effect of the exclusionary rule on police misconduct. Elkins v. United States, 364 U.S. 206, 218 (1960). Ever since *Elkins*, scholars have tried to measure the impact of the exclusionary rule on police misconduct, but the Court has viewed their results as "flawed." United States v. Janis, 428 U.S. 433, 450 & n.22 (1976).

Because of the "high price" to law enforcement extracted by the exclusionary rule, the Chief Justice has demanded that its proponents make a "clear demonstration" of its deterrent value. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). Nevertheless, as one commentator has charged, the Chief Justice's assignment of the "burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative.

favor of the government.[104] Unlawfully seized evidence is now admissible in grand jury proceedings,[105] to impeach the defendant's testimony at his criminal trial,[106] in civil proceedings to collect federal wagering taxes when the ille-

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The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332-33 (1973).

Many scholars have undertaken the challenge to study empirically the impact of the exclusionary rule. In 1970, Professor Oaks, in a widely cited article, concluded that the proponents of the rule had failed to demonstrate that it had any deterrent effect. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 678 (1970). He offered several imaginative—though in the end fruitless—suggestions for trying to measure empirically the rule's impact on police conduct. *Id.* at 732-34. Some of the early efforts to follow through on these suggestions have been discredited. For a devastating criticism, see Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974). Yet this research is still frequently cited as being authoritative. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 225 n.4 (1978).

A survey of later studies leads to the conclusion that the impact of the exclusionary rule cannot be empirically measured. *Compare* Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398, 403 (1979) (existing data do not show whether exclusionary rule deters police misconduct) *with* Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent to Police?*, 62 JUDICATURE 404, 408 (1979) (proponents of rule have not met burden of proof that exclusionary rule is actually deterrent). *See also* Canon, *A Postscript on Empirical Studies and the Exclusionary Rule*, 62 JUDICATURE 455 (1979) (inferences can be drawn from data even though data not absolutely reliable); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974) (empirical data support inference that exclusionary rule is deterrent); Geller, *supra* note 70 (comprehensively surveying arguments for and against exclusionary rule; concluding that exclusionary rule does deter, but recommending that legislature also consider other deterrent mechanisms); Schlesinger, *A Reply to Professor Canon*, 62 JUDICATURE 457 (1979) (criticizing Canon's 1974 empirical study); Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974).

It is one thesis of this article that these efforts to measure the impact of the exclusionary rule have been largely misdirected because they rest on an unduly narrow conception of deterrence. Properly understood, the deterrent effect of the exclusionary rule is manifest. *See* text accompanying notes 161-200 *infra*.

104. This skepticism has not, however, led the Court to abandon the rule in its central application:

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions.

Stone v. Powell, 428 U.S. 465, 492-93 (1976).

105. United States v. Calandra, 414 U.S. 338, 349 (1974) (benefit of extending exclusionary rule to grand jury proceedings outweighed by potential injury to functions of grand jury). Professor LaFave argues that *Calandra* virtually distinguishes Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (grand jury may not subpeona documents when knowledge of their existence and contents derived from illegal search) "out of existence." 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.4, at 64; *see* United States v. Calandra, 414 U.S. at 352 n.8 (*Silverthorne* distinguishable from present case in significant respects and "certainly not controlling"). For an effective criticism of *Calandra*, see Critique, *supra* note 103.

106. United States v. Havens, 446 U.S. 620, 627-28 (1980) (government may impeach defendant's statements in cross-examination suggested by direct examination with illegally-obtained evidence that is inadmissible in direct case). The Court had previously ruled in Walder v. United States, 347 U.S. 62 (1954), that a defendant who perjured himself on direct examination could be impeached with evidence illegally seized from him in connection with an entirely different prosecution. *See id.* at 65 (defendant may not use suppressed evidence as shield to perjurious testimony). *Havens*, however, would allow impeachment of statements elicited on cross-examination with evidence seized in the instant case. It would, in effect, permit impeachment with illegally-seized evidence virtually every time the defendant testifies. What the Burger Court did in *Havens* was much like what it had earlier done in Harris v. New

gal search was conducted by state officials,[107] and in the trials of defendants who are the targets, though not the victims, of illegal searches carefully designed to circumvent application of the exclusionary rule.[108] Federal habeas corpus relief will be denied to a state prisoner if he had a "full and fair opportunity" to litigate his fourth amendment claim in a state criminal proceeding.[109] A new fourth amendment decision will not be applied retroactively, even to cases pending direct review at the time of the decision.[110]

Another problem with the Court's approach is that the cumulative effect of such exceptions may be great, even though the marginal loss of deterrence produced by the refusal to extend the exclusionary rule in a particular context may seem small. If, for example, the police unlawfully stop and search a car and its occupants, it is likely that some of the passengers would not have standing to challenge admission of unlawfully-seized evidence, or that the evidence will be admitted either to impeach the testimony of a defendant, or to secure an indictment in a grand jury proceeding. Although the police may not be thinking about any particular one of these permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off.

By authorizing the use of unlawfully-seized evidence in collateral settings, the Court has so reduced the number of occasions in which the exclusionary rule might be applied that members of the Court[111] have predicted that the Court may abandon the rule altogether. So far, however, only Chief Justice Burger and Justice Rehnquist[112] have expressed a desire to eliminate the rule. During the last six years, in fact, a majority of the Court has applied the exclusionary rule as the means of compelling police respect for an enlarged range of protected interests.[113] The Court has not yet denied the application of the rule

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York, 401 U.S. 222, 225-26 (1971) (statements excluded because of *Miranda* violations may be used to impeach credibility of defendant's trial testimony). For a discussion and criticism of *Harris*, see Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). Ten years later, there is no longer reason to be anxious, just depressed.

107. United States v. Janis, 428 U.S. 433, 454 (1976) (societal costs of excluding evidence unlawfully seized by state officers in federal civil proceeding sufficiently outweigh deterrent effect on state police). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.5, at 90-95 (discussing and criticizing *Janis*).

108. United States v. Payner, 447 U.S. 727, 731 (1980) (defendant may invoke exclusionary rule only when illegal conduct invaded his legitimate expectation of privacy, not that of third party); *see* note 91 *supra* (discussing *Payner*).

109. Stone v. Powell, 428 U.S. 465, 493-94 (1976) (contribution of federal review of state prisoners' search and seizure claims small in relation to costs). *Stone v. Powell* all but explicitly overruled Kaufman v. United States, 394 U.S. 217, 228 (1969) (vindication of prisoners' constitutional rights outweighs value of finality in criminal judgments).

110. United States v. Peltier, 422 U.S. 531, 538-39 (1975) (retroactive application of exclusionary rule does not further its deterrent purpose).

111. *See* United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., with Douglas & Marshall, JJ., dissenting) (expressing "uneasy feeling" that Court prepared to abandon exclusionary rule in search and seizure cases). *See also* note 32 *supra* and accompanying text.

112. *See* California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) (exclusionary rule should be overruled for both federal and state criminal trials); *cf.* Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring) (overruling exclusionary rule would inspire alternative statutory remedy for violation of fourth amendment). *See also* note 32 *supra*.

113. The Court has ruled unconstitutional, and suppressed the fruits of: an arrest made without probable cause or a warrant, Brown v. Illinois, 422 U.S. 590, 601 (1975) (*Miranda* warnings neither remedy nor deter fourth amendment violations); random traffic stops, Delaware v. Prouse, 440 U.S. 648, 663 (1979) (privacy interference and fourth amendment violation to stop automobile without ar-

in a criminal prosecution in which the defendant was the victim of a violation of then-prevailing fourth amendment standards, regardless of whether the offending officer acted in good or bad faith.

Unlike the majority of the Supreme Court, the Fifth Circuit decided that it *does* make a difference whether the offending police officer was acting in good or bad faith.[114] When the appeals court adopted the good faith exception, it claimed that it was doing no more than the Supreme Court has already done—restricting the application of the exclusionary rule to those instances in which it will deter police misconduct.[115] In the Fifth Circuit's view, a police officer who acted in good faith when he violated the fourth amendment cannot be deterred because, by hypothesis, he did not know that what he was doing was unlawful.

Despite a superficial similarity to the analysis that the Supreme Court has developed to withhold application of the exclusionary rule when its deterrent effect would only be incremental, the Fifth Circuit in *Williams* actually misapplied the analysis. Although limiting the rule's application, as the Supreme Court has done, often gives the police a variety of incentives to ignore the commands of the fourth amendment, the *Williams* good faith exception would effectively preclude courts from even articulating those commands. Accordingly, *Williams* is a significant departure from the recent course of Supreme Court case law. It is one thing to deny application of the rule when it will achieve only marginal increments of deterrence; it is quite another to make an exception to the rule that will have the effect of discouraging general police compliance with the fourth amendment.

This article will show that the *Williams* good faith exception is inconsistent with the Fifth Circuit's professed fidelity to the goal of deterrence. Because one mistake of those who advocate the good faith exception flows from an misunderstanding of how the exclusionary rule works as a deterrent, this article will next discuss the deterrent function of the rule itself, and then the ways in which the good faith exception would cripple the rule's operation.

III. THE EXCLUSIONARY RULE AS A DETERRENT

A. THE QUANTUM OF DETERRENCE THE EXCLUSIONARY RULE MUST GENERATE

Although there exists a vast, if ultimately inconclusive, body of literature on the effectiveness of the exclusionary rule as a deterrent,[116] surprisingly little

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ticulable and reasonable suspicion); investigatory arrests for questioning, Dunaway v. New York, 442 U.S. 200, 216 (1979) (detention for custodial interrogation violates interests protected by fourth amendment); warrantless arrests in nonpublic places, Payton v. New York, 445 U.S. 573, 601 (1980) (warrantless entries into homes violates "overriding respect for the sanctity of the home"); warrantless searches of closed containers seized incident to arrest, United States v. Chadwick, 433 U.S. 1, 11 (1977) (sufficient privacy interests in personal effects placed inside double-locked footlocker to entitle defendant to protection of fourth amendment); and entries into the homes of third parties without a search warrant to effect an arrest. Steagald v. United States, 101 S. Ct. 1642, 1648 (1981) (arrest warrant does not entitle police to violate third party's privacy interest in his home).

114. United States v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc) (second majority opinion) (adopting good faith exception to application of excusionary rule), *cert. denied*, 449 U.S. 1127 (1981).

115. *Id.* at 847.

116. *See* note 103 *supra*. *See generally* Burger, *supra* note 94, at 11-12 (concluding that exclusionary

attention has been paid to the threshold issue of what amount of deterrence the rule must generate to justify itself. The question is obviously important; it is also complex. Nevertheless, at least a partial answer is available. The exclusionary rule is justified if suppressing evidence will result in at least the same pay-off in increased protection of privacy, for an equivalent cost in the conviction of wrongdoers, as does the probable cause requirement of the fourth amendment when the police adhere to it. The probable cause requirement reflects a trade-off between the same competing values that are in balance when the issue is whether to suppress evidence on account of a fourth amendment violation. The probable cause requirement compels society to pay a cost in the apprehension of criminals, or in the recovery of evidence of crime, for the sake of the people's privacy. It is surely legitimate for courts to suppress evidence if the lost evidence is counterbalanced by greater security for our "persons, houses, papers, and effects," to the same extent as when, at the same cost, the police comply with the mandate of the fourth amendment not to seize or search without probable cause.[117]

The probable cause requirement is the fundamental test for the constitutionality of most searches or seizures.[118] Before an officer can make an arrest, he

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rule has no substantial deterrent effect); Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1145-58 (1959) (suggesting data on deterrence inconclusive); Oaks, *supra* note 103, at 672-709, 720-57 (concluding that exclusionary rule without demonstrable direct deterrent effect but best existing device for enforcing fourth amendment); Paulsen, *Law and Police Practice: Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 74-76 (1957) (concluding that exclusionary rule most effective remedy because provides incentive to police departments to educate officers and disassociates courts from systematically illegal behavior).

117. Thus, the legitimacy of the exclusionary rule can be established if it can be shown that the balance of its benefits against its costs is no worse than the balance inherent in the probable cause requirement. The converse, however, does not necessarily follow. It may be that the exclusionary rule is constitutionally legitimate or even constitutionally compelled although the probable cause requirement is more cost-effective. It is possible that some alternative justification can sustain the exclusionary rule, even as a purely prophylactic device, despite its costliness in comparison with the probable cause standard. This article does not pursue that point.

118. In almost every situation, a police officer must have probable cause before searching or seizing. *See* Dunaway v. New York, 442 U.S. 200, 210, 216 (1979) (probable cause required to seize suspect and to transport him to headquarters for interrogation). Some types of detentions and searches, however, are inherently less intrusive than others. If a police officer lacks probable cause but has reasonable articulable suspicion that a person is committing or has committed a crime, the officer may approach the suspect, identify himself, and question the suspect briefly. If, furthermore, the officer has an articulable reason to suspect that the person may be armed and dangerous, he may conduct a limited patdown of the suspect's outer clothing for weapons. Terry v. Ohio, 392 U.S. 1, 30 (1968). The police may conduct searches and seizures in a small class of additional cases on a lesser standard than probable cause if their conduct is deemed relatively unintrusive and the law enforcement need is deemed great. *See, e.g.*, Michigan v. Summers, 101 S. Ct. 2587, 2595 (1981) (probable cause not required for police to detain occupant during valid warrant search of house for contraband); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (probable cause not required for police to order driver out of lawfully-stopped car); Adams v. Williams, 407 U.S. 143, 147-48 (1972) (less than probable cause sufficient for police to perform limited search of driver sitting in car parked in high crime area late at night when officer had tip that driver armed).

Other searches that are permitted without probable cause are, for the most part, the so-called administrative or regulatory searches. These include searches of businesses to enforce health and safety regulations, border searches, and airport searches. *See* Donovan v. Dewey, 101 S. Ct. 2534, 2541-42 (1981) (statute authorizing warrantless inspections of mines and stone quarries does not violate fourth amendment); United States v. Ramsey, 431 U.S. 606, 617 (1977) (border searches not subject to warrant provisions of fourth amendment and do not require probable cause); United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973) (pre-boarding screening of passengers and carry-on luggage at airport gate does not violate fourth amendment even though conducted without warrant). These searches have been upheld primarily because they occur as part of a highly visible, regulatory or administrative scheme of general

must have probable cause to believe that the suspect committed a crime.[119] Likewise, before he may conduct a search or seize property, an officer must have probable cause to believe that his efforts will yield either contraband or the fruits, instrumentalities, or evidence of a crime.[120]

Both the exclusionary rule as a deterrent and the probable cause requirement are regulatory. Each aims to control law enforcement behavior, the probable cause requirement through a mandate to law enforcement officers and reviewing magistrates, and the exclusionary rule through a mandate to trial courts. Further, they both strike a balance between the legitimate needs of law enforcement and the right of the citizen to be free from unreasonable governmental intrusion.[121] Although the Supreme Court has never precisely defined probable cause,[122] its meaning is surely very close to "more likely than

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application, so that there is little likelihood that the searches will be conducted in an arbitrary or discriminatory manner. When courts have concluded that the regulatory scheme left too much discretion to those administering it, they have struck down the statutes and suggested guidelines to ensure impartial application. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (random stop of automobiles for license and registration check constitutes unreasonable search under fourth amendment; Court suggests that questioning of all drivers at fixed stop might be permissible); Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978) (warrantless inspections under Occupational Safety and Health Act violate fourth amendment; reasonableness of other warrantless administrative searches will depend upon specific enforcement needs and privacy guarantees of particular statute); See v. City of Seattle, 387 U.S. 541, 545-46 (1967) (administrative search of portion of commercial premises not open to public permissible only through warrant procedure; licensing programs requiring inspections will be examined on case-by-case basis in future).

Moreover, no stigma attaches to the targets of these searches. The individuals subject to them are members of morally neutral classes, not of traditionally disfavored economic or racial subgroups who are likely to be, or at least perceive themselves to be, singled out for unfair treatment and whose privacy government officials may be prone to undervalue. Finally, individuals may be able to avoid regulatory searches by altering their conduct, and often are forewarned as to when and where the searches will occur.

119. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (probable cause required for arrest). In Beck v. Ohio, 379 U.S. 89 (1964), the Supreme Court explained the test for the validity of an arrest as:

> [W]hether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Id. at 91.

120. *See* Warden v. Hayden, 387 U.S. 294, 309-10 (1967) (if probable cause exists, police may search for evidence as well as fruits, instrumentalities, and contraband).

121. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949) (probable cause standard provides balance between desire to prevent unreasonable invasions of privacy and attempt to give flexibility to law enforcement).

122. The Supreme Court has suggested that probable cause does not exist unless the information at hand singles out a particular individual. *See* Wong Sun v. United States, 371 U.S. 471, 483-85 (1963) (no probable cause to arrest when agent could not know whether defendant was in fact person described by informant); Johnson v. United States, 333 U.S. 10, 16 (1948) (no probable cause for arrest when police officers did not know identity or number of occupants of room from which they detected odor of opium). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.2(e), at 477-79.

The Model Code of Pre Arraignment Procedure (Proposed Official Draft, 1975) would permit investigative arrests on the less stringent standard of "reasonable cause." *Id.* at 14. The Code draftsmen contend that this standard is not foreclosed by present law, citing several state court decisions and one decision from a United States Court of Appeals. *Id.* at 294.

In Dunaway v. New York, 442 U.S. 200 (1979), however, the Supreme Court pulled the rug out from under this recommendation. In *Dunaway*, the Court held that probable cause is required for an investigatory arrest, *id.* at 214, and emphasized that the standard for probable cause is stringent:

> The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised [by al-

not."[123] Speaking generally, the police may arrest a person who more likely than not has committed, or is committing, an offense. Similarly, they may search if more likely than not they will find the incriminating evidence they seek. Thus, in either of these situations, the police must reasonably believe that the likelihood that they will obtain their goal—by bringing a guilty person to book or by recovering evidence of his offense—is greater than fifty percent. Over a period of time, therefore, the fourth amendment tolerates the arrest or search of x number of innocent people if, correspondingly, there are $x + 1$ arrests of the guilty or searches that pay off. To state the formula the other way, for y number of fruitful police invasions of people's privacy, there must be no more than $y - 1$ fruitless invasions.[124] Otherwise, the police are searching and seizing when their suspicions do not rise to the level of probable cause.

The analogy between the probable cause standard and the exclusionary rule is most striking when we consider how the probable cause mandate operates to forbid a search or seizure. Under that standard, the police must forbear when the likelihood that their suspicions will prove justified is merely fifty percent or less. Thus, the fourth amendment requires that, over time, society tolerate z number of guilty persons escaping arrest or avoiding a search that would have uncovered evidence of their delicts, if, correspondingly, there are z or more innocent persons who thereby escape an unnecessary police intrusion.[125] Pre-

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lowing an exception to the requirement for investigatory arrests]. "The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest."

Id. at 213 (quoting Henry v. United States, 361 U.S. 98, 100 (1959)). The Court then went on to reject a proposed "multifactor balancing test," *id.* at 213, which would require the police, and then the reviewing court, to weigh "the manner and intensity of the interference, the gravity of the issue involved and the circumstances attending the encounter," in judging the lawfulness of an arrest for further investigation. *Id.* at 211 n.14.

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases . . . . A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

Id. at 213-24 (footnote omitted).

123. In *Brinegar v. United States*, the Supreme Court noted that: "Probable cause exists 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 388 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). Such a belief would not be warranted if the facts available to the officer made it as likely as not that the officer was wrong.

124. This section has drawn a correspondence between fruitful and fruitless searches and seizures, rather than between legal and illegal police conduct because that is the correspondence that the probable cause standard itself suggests. The suppression of evidence of one fruitful but illegal search is justified if one fruitless search is thereby prevented. A somewhat more complicated question is how many future illegal searches (fruitful and fruitless alike) must be deterred in order to justify suppression. As the point seems largely irrelevant to this discussion, it has not been pursued.

125. This discussion assumes for the sake of simplicity that a person who secretes evidence of a crime is in fact guilty of an offense. The police may, however, invade a person's privacy, no matter how innocent he is, if they have sufficient grounds to believe that the search will yield evidence. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978) (critical element of reasonable search not that owner of property suspected of crime, but rather that police have reasonable cause to believe that evidence located on owner's property).

cisely the same values are in conflict when the decision is whether illegally-seized evidence should be suppressed. Society's right to apprehend and convict the guilty is pitted against the people's right to be secure against governmental intrusion. The exclusionary rule is amply justified, then, if its operation replicates the results of the probable cause requirement; that is, if the suppression of the fruits of one illegal search or seizure leads to the avoidance of a single fruitless police intrusion in the future.[126]

The warrant requirement of the fourth amendment provides further support for adopting the probable cause standard as the proper measure for justifying the exclusionary rule. Although the argument for the suppression of evidence for a violation of the warrant requirement is more attenuated than for a direct violation of the probable cause requirement,[127] both the warrant requirement and the exclusionary rule have the same overarching purpose: protection against searches and seizures conducted without probable cause. The procedural requirements of the warrant clause implement the probable cause standard. The warrant requirement allows a magistrate to assess independently the presence of probable cause before the policeman acts.[128] Similarly, the particularity requirement of the warrant clause seeks to ensure that the officer will search only those areas, and seize only those items, with respect to which the magistrate has found probable cause.[129] Suppression motivates the police to comply with the warrant requirement in the future, thereby increasing reliance on warrants and reducing the likelihood that an officer will arrest or search without probable cause.[130]

126. Although for the sake of convenience the argument above is in terms of the discrete quantum of deterrence that might flow from a single suppression order in a particular criminal prosecution, the question should usually be considered in a broader context. Our concern is ultimately with a viable system of suppression. A single suppression order in a single case may have little or no discernible effect on future police conduct; yet consistent application of the exclusionary rule by a reasonable and resolute judiciary could significantly alter police behavior.

127. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). Because suppression of evidence for a violation of the warrant requirement does not depend upon the probability of a successful search or seizure, application of the exclusionary rule when there has been a violation of the warrant requirement does not directly replicate the balance that the probable cause standard establishes. Nevertheless, because the warrant requirement implements the probable cause standard, it is possible to measure the deterrent effect of suppressing evidence for warrant clause violations in the same manner as for violations of the probable cause requirement.

128. *See, e.g.,* United States v. United States Dist. Court, 407 U.S. 297, 317 (1972) (review by neutral magistrate mandatory); Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (State Attorney General may not issue warrant); Mancusi v. DeForte, 392 U.S. 364, 371 (1968) (use of subpoena *duces tecum* as search warrant improper because circumvents requirement of review by magistrate); Johnson v. United States, 333 U.S. 10, 14 (1948) ("neutral and detached magistrate" better judge of probable cause than "officer engaged in the often competitive enterprise of ferreting out crime").

129. *See* Andresen v. Maryland, 427 U.S. 463, 480-82 (1976) (fourth amendment prohibits general warrants; valid search warrant limited to evidence of suspected crime); Berger v. New York, 338 U.S. 41, 59-60 (1967) (wiretap statute failed particularity requirement when it only required names and addresses of persons whose conversations were to be audited).

130. Application of the exclusionary rule to violations of the warrant requirement does not impose greater costs than application of the rule to searches and seizures made without probable cause. If an officer is unable to obtain a warrant in time to conduct a search, the absence of the warrant is likely to be excused under the "exigent circumstances" doctrine, and the evidence admitted. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit of suspect justifies warrantless entry); Schmerber v. California, 384 U.S. 757, 770 (1966) (officers' reasonable belief that evidence would be destroyed justified withdrawing blood for alcohol test from unconscious accident victim); McDonald v. United States,

Despite the similarities between the probable cause requirement and the exclusionary rule, the disparate amount of public attention that their effects receive constitutes one important difference. The costs of the exclusionary rule are immediately apparent; its benefits are only conjectural. When courts apply the rule, they deprive law enforcement officers of incriminating evidence. In contrast, any police misconduct that would have occurred but for the deterrent effect of the suppression order is purely speculative. On the other hand, when the police do not search because they believe they lack probable cause, the public is not aware that potential evidence is lost. Further, in the unlikely event that the public becomes aware of a decision not to search, the benefits are apparent. An individual's privacy remains intact while the cost is merely conjectural; it cannot be known if evidence was in fact lost. Thus, although the cost of adhering to the requirements of the fourth amendment and the cost of applying the exclusionary rule are similar, the exclusionary rule "rubs our noses in it."[131]

B. TYPES OF DETERRENCE

As the preceding section has demonstrated, the probable cause standard suggests a threshold level of deterrence that would justify the continued existence of the exclusionary rule. In order to determine whether the rule does adequately prevent police misconduct, this article considers three distinct types of deterrence. Professor Oaks identifies the first two types: "special deterrence," which describes the effect on the particular officer who violated the fourth amendment and has had evidence suppressed, and "general deterrence," the name for the rule's restraining influence on other officers.[132] There is yet a third form of deterrence, "systemic deterrence," that Professor Oaks overlooks. This article uses the term systemic deterrence to describe the rule's effect on individual police officers through a police department's institutional compliance with judicially articulated fourth amendment standards. As developed below, this process is most visible when the police must respond to changes in

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335 U.S. 451, 454-55 (1948) (imminent danger to innocent party, threat of destruction of evidence, and possible flight by suspect justify warrantless search and seizure); Johnson v. United States, 333 U.S. 10, 15 (1948) (same). If courts without hesitation suppressed evidence for all purposes whenever an officer improperly proceeded without a warrant, the rational police officer, erring on the side of caution if uncertain of whether a warrant was necessary, would always obtain a warrant when required and practicable. He would have nothing to lose by complying with the warrant requirement, and nothing to gain from disobeying.

The exclusionary rule as a result would be extremely cost-effective. At virtually no cost, it would achieve nearly complete compliance with the warrant requirement. Any exceptions to the exclusionary rule that might tempt an officer to dispense with a warrant would not only impair the right of the people to be secure from unjustified searches and seizures, but also result in unnecessary loss of evidence. Thus if an officer hoped that, despite his failure to obtain a warrant, the evidence might nevertheless be useful against a defendant without standing, *see* United States v. Salvucci, 448 U.S. 83, 85 (1980), as impeachment evidence, *see* United States v. Havens, 446 U.S. 620, 627-28 (1980), or in the prosecution's case-in-chief if the officer acted in good faith, *see* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (second majority opinion), *cert. denied*, 449 U.S. 1127 (1981), he would be more likely to ignore the warrant requirement. Yet, if officers are led to miscalculate, the public suffers a double loss. Its privacy is less secure, and criminals benefit from the suppression of probative evidence.

131. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

132. Oaks, *supra* note 103, at 709.

fourth amendment law.[133] Further, the rule prevents violations of fourth amendment standards by facilitating the articulation of the standards themselves. The exclusionary rule works systematically through these means to make privacy rights more secure.

Special Deterrence. Oaks defines "special" deterrence as the prevention of future misconduct by one particular officer through the imposition of an individual sanction.[134] In Oaks' analysis, the exclusionary rule does not even attempt to perform this function because it does not impose any direct punishment.[135] Oaks doubts that the disappointment an officer experiences when a court suppresses evidence will motivate him to change his ways in the absence of any formal departmental action.[136] Yet elsewhere in his article, when he describes what he learned one summer as an Assistant State's Attorney in Chicago, he relates that after the prosecutor lost a motion, he "found a significant fraction of patrolmen who were leaving the courtroom confused and bitter about the action taken, attributing it to the venality of the judges or prosecutor (or both), and having no idea whatever of how to modify their own conduct to avoid a repetition."[137] Whatever else his observations may show, Oaks has described police officers who care that evidence has been lost and who presumably would want to avoid this result in the future. Further, an empirical study of police officers' responses to questionnaires revealed that a significant number of officers felt "a personal loss" when a court suppressed evidence they had seized.[138] Thus, it is reasonable to conclude that the threat of the exclu-

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133. Although Oaks discusses only special and general deterrence, "systemic" deterrence is somewhat different. The effect of systemic deterrence is self-evident as police departments continue to issue directives to their officers. Its success rests on the assumption that police officers follow department orders. Police department responses include issuance of direct orders, dissemination of fourth amendment decisions, training both new and experienced officers, and formation of policy on police conduct in search and seizure situations. *See* notes 162-74 *infra* and accompanying text (discussing department reactions to Delaware v. Prouse, 440 U.S. 648 (1979)).

134. Oaks, *supra* note 103, at 709.

135. *Id.*

136. *Id.* at 710.

137. *Id.* at 731 n.193.

138. J. HIRSCHEL, FOURTH AMENDMENT RIGHTS 86-87 (1979). Hirschel requested police officers, district attorneys, and defense attorneys to register their agreement scaled from zero to 100 to several statements relating to the deterrent effect of the exclusionary rule. A score of 100 would indicate total agreement. The police overall mean in response to the statement, "A police officer feels a personal loss when evidence he has seized is excluded in a court" was 58.8. *Id.* In response to the statement, "The exclusion of illegally seized evidence in court proceedings discourages police officers from making many kinds of searches they would otherwise make," the police overall mean was 65.5. *Id.* at 84-85. The statement, "An important factor in a police officer's decision to search is whether the article he is looking for will be admissible as evidence in court" elicited a police overall mean response of 56.9. *Id.* at 85.

Though Hirschel contends that his study reveals that the exclusionary rule is an ineffective deterrent, his data seem to belie his conclusion. Officers in his study were asked whether they would search in certain hypothetical situations. But it is simply impossible to determine to what extent a police officer owes his personal views of what searches and seizures are reasonable to the operation of the exclusionary rule and resulting court decisions giving content to the fourth amendment. Thus, even though the officers in Hirschel's studies tended to a broader view of what was reasonable than the view that the courts in fact held (each of Hirschel's questions derived from a published appellate court decision), the officers' views might nonetheless reflect the influence of the courts. Most importantly, the police apparently share the view that a search is reasonable only if it is likely to uncover evidence and that an arrest is reasonable only if the person arrested is probably guilty. In other words, they accept the probable cause standard as the test of reasonableness. There is, of course, no inherent reason why this should be

sionary sanction does influence individual police officers.

General Deterrence. The exclusionary rule not only deters the police officer who has had evidence suppressed from further unlawful searches, but also deters law enforcement officers who are aware of the rule yet have not personally experienced the loss of evidence. Oaks describes this effect as general deterrence and divides it into two subcategories: "direct," with immediate effects, and "indirect," entailing long term results.[139]

Direct deterrence, in Oaks' analysis, requires effective communication between the police department and police officers to be successful.[140] Other considerations important to the effectiveness of direct deterrence include an officer's understanding of fourth amendment law, his fear of suppression, and the importance to him of not violating the fourth amendment.[141] The direct deterrent effect of the exclusionary rule depends upon an individual officer's perception of the relative costs of conformity and nonconformity with the rule.[142] Indirect deterrence, on the other hand, depends upon the extent to which police officers' values reflect fourth amendment standards.[143] A threat of punishment helps to develop patterns of conforming behavior that influence an officer's conduct even after he has ceased to weigh the pros and cons of observance in an individual case.[144] Further, Oaks contends that the exclusionary rule provides a police officer with an argument to justify his own compliance with fourth amendment standards, when his fellow officers do not regard such compliance as desirable in its own right.[145]

Operation of Special and General Deterrence. In Oaks' view, the exclusionary rule does not achieve very much deterrence through either of these mechanisms because the requisites for effective deterrence are lacking.[146] Specifically, Oaks contends that: (1) suppression affects only police behavior aimed at successful prosecution,[147] (2) police officers as a group do not share a system of values that emphasizes protection of constitutional rights,[148] and (3) the exclusionary rule attempts to enforce a poorly-communicated and confusingly-articulated set of standards.[149]

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so. Certainly, societies exist where the police can search, arrest, or demand documentary evidence of identification on the slightest suspicion or even at will. That the police in our society perceive "reasonableness" as they do may well be a function of court decisions and the operation of the exclusionary rule. Thus, although there is naturally a gap between the views of the courts and the views of the police, the width of the gap might be fairly constant. Police perception of reasonableness will shadow court rulings as long as the courts continue to interpret and enforce the fourth amendment by suppressing evidence obtained in violation of its standards. For a discussion of this neglected, educative function of the law, see F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 77-83 (1973).

139. Oaks, *supra* note 103, at 710-12.
140. *Id.* at 710.
141. *Id.* at 710-11.
142. *Id.* at 710.
143. *Id.* at 711.
144. *Id.*
145. *Id.* at 712.
146. *Id.* at 720.
147. *Id.* at 720-23.
148. *Id.* at 727-29.
149. *Id.* at 730-32. Oaks also suggests other limitations upon the effectiveness of the exclusionary

Oaks' first criticism, that the exclusionary rule may not deter police conduct aimed at goals other than conviction, is beside the point. The only sensible measure of the deterrent value of the rule is the number of illegal searches and seizures it prevents, not the number that occur despite it. The fallacious argument that the rule is a failure because it cannot deter some kinds of illegal searches often recurs in discussions of deterrence. In their study of deterrence, Zimring and Hawkins dub it the fallacy of "The Warden's Survey."[150] They cite the works of several celebrated prison wardens to show how the warden's perspective can skew his perception of the deterrent effect of the criminal law.[151] A warden of Sing Sing, for example, wrote that "the prison man knows this threat [the death penalty] is no deterrent for convicts have told him so again and again."[152] As Zimring and Hawkins explain, the fallacy of this inference is that the warden "has based his conclusion on experience with groups of men who have evidently *not* been deterred or they would not be in prison."[153] His experience provides scant information about how many others the threat of capital punishment has deterred. The warden has simply never met them. Whatever one's view of the death penalty, all sanctions for murder should not be repealed simply because some people have killed in spite of those sanctions. Similarly, the exclusionary rule should not be abolished merely because some police officers violate the fourth amendment in spite of it. If the rule cannot influence certain types of police behavior, the answer is to devise additional controls, not to abolish the one significant control that already exists.

Professor Amsterdam suggests that the exclusionary rule is analogous to police department anti-theft programs for branding personal property.[154] Identification marks diminish the value of property to a prospective thief because he knows that it will be more difficult to sell the goods at a worthwhile price.[155] Thus, such programs reduce the incentive to steal. Although thieves who steal only for excitement, for their own use, or for revenge, are not deterred by identification programs, police departments should not, for this reason alone, abandon these programs. The assertion that the exclusionary rule fails to deter a police officer whose conduct is motivated by other than the hope for successful prosecution is a similarly unconvincing argument for abandoning the exclusionary rule.

Oaks' second argument, that police values may conflict with constitutional values,[156] is more troublesome. This tension, however, would frustrate *any*

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rule. First, police officers have little fear of disciplinary action by the department. Second, the penalty of the exclusionary rule falls not upon them, but upon the prosecutor. *Id.* at 725-26. Third, motivation to comply with the fourth amendment varies widely among different officers in particular situations. *Id.* at 729-30.

150. F. ZIMRING & G. HAWKINS, *supra* note 138, at 30-32.

151. *Id.* nn.26-31 (citing C. DUFFY, 88 MEN AND 2 WOMEN (1962); L. LAWES, MEET THE MURDERER! (1940); Kirchwey, *The Prison's Place in the Penal System*, 157 ANNALS OF AAPSS 13 (1931)).

152. *Id.* at 31 (citing DUFFY, *supra* note 151, at 22).

153. *Id.*

154. Amsterdam, *supra* note 88, at 431.

155. "[O]n the other hand," as Amsterdam puts it, "a criminal court system functioning without an exclusionary rule . . . is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality." *Id.* at 431-32.

156. Oaks, *supra* note 103, at 727-29.

remedy designed to conform police conduct to constitutional standards. Yet there is evidence that the problem is, at least in part, generational. Younger officers may be more willing to accept the legitimacy of constitutional restraints in solving crimes and apprehending offenders.[157]

Oaks' third criticism, that police officers do not understand fourth amendment standards because those standards are poorly-communicated and confusingly-articulated,[158] is likewise vexing. Nevertheless, this failure of communication is a difficulty that must be overcome if police are ever to comply with constitutional standards, whatever enforcement mechanism courts may employ.[159] Thus, the lack of understanding is a problem attendant to the fourth amendment itself, not to the exclusionary rule.[160] If poor communica-

157. *See* S. WASBY, SMALL TOWN POLICE AND THE SUPREME COURT 109, 218 (1976) (study of police in rural communities indicated "generational effect" in reactions to exclusionary rule). *See also* Amici Curiae Brief for Americans for Effective Law Enforcement, Inc. at 17, California v. Krivda, 409 U.S. 33 (1972) (arguing that exclusionary sanction no longer constitutionally required because police professionalism in search and seizure area has eliminated bulk of fourth amendment violations).

158. Oaks, *supra* note 103, at 730-32.

159. The problem of unclear standards is likely overstated. In certain areas where the law remains unsettled—notably the "container" search cases—standards are confusing. Nevertheless, the basic standards for the great majority of searches and seizures are far more definite. The fundamental principle that the police may not conduct a search or seizure without probable cause is easy enough to understand, and the courts have perfromed generally well in giving the police guidance whether probable cause is present in recurring fact patterns. *See* notes 185-93 *infra* and accompanying text. Further, situations where the police may search or seize without probable cause are about as clearly defined as one could realistically hope. *See* note 118 *supra*.

Reading reported appellate cases yields skewed perceptions of the difficulties police encounter when trying to comply with the fourth amendment, because reported cases are likely to be the very ones where the propriety of police action is doubtful, but the action is not clearly wrong. The vast bulk of police searches and seizures are never recounted in the case reports. Moreover, in the area where confusion is presently greatest, the container search cases, the issue is whether the police may search without a warrant. Even if the bounds of the warrant requirement are hazy in those cases, the police can easily obtain the evidence they seek and comply with the fourth amendment by simply obtaining warrants in doubtful cases.

160. This is, for example, the argument in Dworkin, *supra* note 103. Dworkin, himself a supporter of the exclusionary rule, *id.* at 330-33, nonetheless asserts that "the law does not permit the rule to work as well as possible." *Id.* at 333. In his view, "[f]ourth amendment law is so uncertain, incomprehensible, quibble ridden, and ever changing that it deprives any sanction of a meaningful chance to control conduct." *Id.* at 333-34. The underlying disease generating these symptoms is, Dworkin believes, the "fact style decision making," *id.* at 334, by which the Court too often resolves fourth amendment issues. *Id.* at 334. Dworkin advocates regulating the police through inflexible enforcement of rules "expressed in language directed to the police and clear and precise enough for them to follow." *Id.* at 336. This solution, Dworkin argues, would obviate the need for determining the applicability of a rule on a case-by-case basis. *Id.* Dworkin's criticisms, whatever their merit, are not criticisms of the exclusionary rule.

At the end of its most recent term, the Supreme Court decided two fourth amendment cases that suggest that the Court may be moving toward a more rule-oriented conception of the amendment. In New York v. Belton, 101 S. Ct. 2860 (1981), the majority, in an opinion by Justice Stewart, announced the bright-line rule that when police lawfully arrest the occupant of a car, they may search the entire passenger compartment and any open or closed containers found within. *Id.* at 2864 & n.4. The opinion purported to be only an extension of Chimel v. California, 395 U.S. 752 (1969). 101 S. Ct. at 2864. Writing for the majority in *Chimel*, Justice Stewart had limited the scope of a search incident to a valid arrest to the area within the arrestee's immediate control, in which he could obtain a weapon or destroy evidence. 395 U.S. at 763. The Court in *Chimel*, however, had established only a general rule for application on a case-by-case basis.

In Robbins v. California, 101 S. Ct. 2841 (1981), decided the same day as *Belton*, Justice Stewart again endeavored to establish a hard and fast rule. *Id.* at 2847. In *Robbins*, the police seized two bricks of marijuana wrapped in opaque plastic in the luggage compartment during a valid automobile search. The court held the search invalid and the marijuana inadmissible. Police must obtain a warrant to search opaque containers found in the luggage compartment during a lawful search of a car. *Id.* In

tion is a reason to abolish the exclusionary rule, then it would similarly be a reason to abolish any device for enforcing the fourth amendment. Moreover, it would be craven for us to abolish the exclusionary rule on grounds of ineffectiveness when the police themselves hold the key to rendering it effective through better hiring practices, training, and continuing instruction.

Systemic Deterrence. Although Oaks' criticisms of the exclusionary rule as a deterrent can be individually countered, the major flaw underlying his entire argument is his reliance on the analogy between the deterrent effect of criminal law and the deterrent effect of the exclusionary rule. This analogy fails under close analysis, because the exclusionary rule operates through mechanisms that simply have no analog in the penal law. Unlike the criminal law, which seeks to control the behavior of the general public, the exclusionary rule attempts to influence the conduct of members of various law enforcement agencies. Although there are many such agencies, each is a structured governmental entity. It is likely that the threat of the exclusionary sanction will influence these various police units and through them, the individual officers. Consequently, even if a particular constable is indifferent to whether his arrests and seizures result in convictions, those who run the police department are concerned with successful prosecutions. Further, although individual officers might entertain hostility toward fourth amendment rights, police departments are not likely to share such a view, at least officially. Thus, at least the more professional police forces can be expected to encourage fourth amendment compliance through training and such guidelines as the department provides for conducting searches, seizures, and arrests.

Moreover, even if the standards that the fourth amendment sets are more elusive than the rules embodied in the general criminal law, police officers are in an excellent position to assimilate them. The fourth amendment, after all, permeates the officers' day-to-day professional life, and police departments surely possess the means to convey information to the officers in the field. Even if prosecutors cannot always find the time to explain the fourth amendment to the police, many of the larger police departments hire legal counsel to make legal standards intelligible to the policeman on patrol.[161]

An example of systemic deterrence is the administrative response to the Supreme Court's decision in *Delaware v. Prouse*.[162] In *Prouse*, the Court ruled that police may not stop a car on the open road for a license or registration check, in the absence of articulable suspicion to believe that criminal activity is afoot.[163] Before *Prouse*, the constitutionality of random traffic stops was un-

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Robbins Stewart wrote only for a plurality. Justice Powell concurred in the judgment but rejected the plurality's bright-line rule in favor of a test of whether a sufficient expectation of privacy in the items searched exists. 101 S. Ct. at 2847 & n.1 (Powell, J., concurring). Regardless of the wisdom of the opinions in *Belton* and *Robbins*, these cases demonstrate the Court's increased sensitivity to the need for more manageable standards. *But see* United States v. Ross, 655 F.2d 1159 (D.C. Cir.) (en banc) (court of appeals held that police required to obtain warrant to search paper bag in automobile trunk; Supreme Court agreed to hear argument on question whether *Robbins v. California* should be reconsidered), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 80-2209).

161. *See* notes 162-74 *infra* and accompanying text (discussing police department reactions to fourth amendment decisions).

162. 440 U.S. 648 (1979).

163. *Id.* at 663.

certain.[164] In the District of Columbia, for example, police had conducted such stops upon the strength of a 1972 decision of the District of Columbia Court of Appeals.[165] Nevertheless, when in 1979 the Supreme Court in *Prouse* announced that these stops violated the fourth amendment,[166] the D.C. Metropolitan Police reacted swiftly. The Chief of Police issued an immediate telex message to his officers, advising them to desist from the practice.[167] The Police Department is now incorporating the change in procedures in the Department's General Orders, a set of regulations issued to each officer and with which each officer must be familiar.[168]

Even before the ultimate Supreme Court decision in *Prouse*, the Delaware State Police had responded to the trial court's holding that random traffic stops were unconstitutional.[169] After the trial court's decision the State Attorney General's office conferred with a Legal Officer employed by the Delaware State Police.[170] Within two months of the court's decision, the Legal Officer had disseminated a memorandum to all troops and units within the State Police describing the decision, explaining the conduct it prohibited, and advising that it did not affect stops based on articulable suspicion.[171] The memorandum also provided several examples of facts that could provide sufficient articulable suspicion for a stop.[172] The Legal Liaison Office of the Delaware State Police has noted that "[a]ll court decisions affecting daily police operations are disseminated to patrol officers by similar Legal Memorandums."[173]

While this article has not undertaken to survey other police department responses to *Prouse*, or other court decisions changing or clarifying the scope of permissible police conduct,[174] it is apparent what police departments, or at least the larger of them, can do. It denigrates the professionalism of the police

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164. *See id.* at 651 & nn.2-3 (listing conflicting decisions on issue of random stops in state and federal courts of appeals).

165. Palmore v. United States, 290 A.2d 573, 583 (D.C. 1972), *aff'd on jurisdictional grounds*, 411 U.S. 389 (1973).

166. 440 U.S. at 663.

167. *See* Wash. Post, March 28, 1979, § A, at 1, col. 4 (discussing D.C. Police Chief Jefferson's prompt orders to officers to stop performing random traffic stops without articulable suspicion).

168. *See* M.P.D.C. Gen. Order 304-10 (1973). This general order, which deals with a broad range of police-citizen contacts, is currently being updated to take into account recent changes in the law. Telephone conversation between Silas Wasserstrom and Vernon Gill, General Counsel, Metropolitan Police Department (Nov. 12, 1981). The general order's provisions on traffic stops have already been rescinded by a special order. *Id.*

169. State v. Prouse, No. 176-12-0213 (Del. Super. Ct. Mar. 10, 1977) (per Walsh, J.) (unreported) (copy on file at *Georgetown Law Journal*), *aff'd*, 382 A.2d 1359 (Del. 1978), *aff'd*, 440 U.S. 648 (1979).

170. Memorandum from James E. Liguori, Deputy Attorney General of the State of Delaware to Lieutenant Thomas J. Roman (Mar. 31, 1977) (copy on file at *Georgetown Law Journal*).

171. Legal Memorandum, No. 2-77, from Lieutenant Thomas J. Roman, Legal Officer, Delaware State Police (May 2, 1977) (copy on file at *Georgetown Law Journal*).

172. *Id.*

173. Letter from Captain Thomas J. Roman to Scott Mendeloff (July 17, 1981) (copy on file at *Georgetown Law Journal*). Captain Roman kindly gave us this information in answer to our inquiry concerning the response of the Delaware police to *Prouse*, and he provided us with copies of the documents cited in notes 170-71 *supra*.

174. Another case in point that can be readily documented is the response to Almeida-Sanchez v. United States, 413 U.S. 266 (1973). After the Court's decision in that case, Border Patrol agents altered their practices to conform with it. United States v. Brignoni-Ponce, 422 U.S. 873, 880 n.6 (1975). In *Almeida-Sanchez*, the Court held that probable cause is necessary for random, full-car searches near the Mexican border. 413 U.S. at 273. *But see* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (no suspicion required for police to stop and question occupants of car at reasonably located

to assume that they cannot or will not assimilate the standards that the courts set. It is reasonable to assume that a professional police department can obtain substantial compliance from its officers in the field, especially when, as in *Prouse*, a new decision announces a relatively clear-cut rule.[175]

The suppression of evidence in *Prouse*, therefore, was a small price to pay for an enormous benefit in protection from unlawful police activity. At the cost of one marijuana prosecution, the Delaware State Police, and, it can be expected, police everywhere who had previously conducted routine license and registration spot checks, have abandoned this practice. No doubt countless motorists have been, and will be, spared this violation of their constitutional rights. Thus, applying the measure of the deterrent effect of the exclusionary rule that the probable cause requirement suggests—that suppression of evidence in one case must prevent police misconduct in one or more instances—the exclusionary rule performs admirably. Applying the rule not only deters the specific officer who lost evidence from repeating his transgression, but the specter of the rule also deters officers who have not personally lost evidence. Even more dramatically, the rule prevents countless abridgements of fourth amendment rights through law enforcement's institutional response to changes in fourth amendment law.

C. PREVENTION OF VIOLATIONS THROUGH DEVELOPMENT OF FOURTH AMENDMENT LAW

As *Prouse* demonstrates, the exclusionary rule affects police department conduct and achieves at least systemic deterrence. An equally important, although less obvious, benefit of the rule is that it fuels the development of fourth amendment law. A glance through any criminal procedure case book

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border checkpoints); United States v. Brignoni-Ponce, 422 U.S. at 881-82 (articulable suspicion sufficient for Border Patrol agent to stop car near Mexican border and to conduct limited questioning).

Although similar examples of changes in institutional policy resulting from court decisions on the fourth amendment abound, the literature concerning empirical evidence on the effectiveness of the exclusionary rule largely ignores them. Assuming that field officers obey administrative directives concerning proper search and seizure procedures (and they surely do to some significant degree), cases such as *Prouse* and *Almeida-Sanchez* clearly demonstrate that suppression of evidence in one case can prevent subsequent fourth amendment violations. This is, manifestly, a form of deterrence.

175. Fourth amendment decisions result in changes in the behavior of law enforcement officials not only at state and local levels, but also at the federal level. In an address to the Harlan Fiske Stone Law Society at Amherst College, FBI Director William Webster described the FBI's present methods of apprising its agents of all Supreme Court and relevant court of appeals fourth amendment decisions. Webster, *Routine Methods Won't Stop the Leaders of Crime*, AMHERST, Summer 1981, at 27. Webster stated that "[w]ithin 24 hours after a major case comes down affecting our right to do anything, the people in the field are informed of the significance of that case, with more details to follow." *Id.* An example of this action was the FBI's response to decisions on the authority of the agency to enter premises surreptitiously to install a microphone. The United States Court of Appeals for the Sixth Circuit held that, although the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (1976), permitted the FBI to seek a court order to enter, it did not authorize a surreptitious break-in even with such an order. United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979). The FBI promptly informed its agents within the jurisdiction of the Sixth Circuit of the decision in *Finazzo*, and instructed them to stop conducting surreptitious entries. Webster, *supra*, at 27. The Supreme Court later decided that such entries were legal. *See* Dalia v. United States, 441 U.S. 238, 248, 254 (1979) (fourth amendment does not prohibit per se, and title III implicitly permits, courts to authorize covert entries to install electronic surveillance devices). The FBI again sent instructions to its agents. Although the Court held that the statute did not require a court order for surreptitious entry, the FBI still demanded that its agents seek court authorization. Webster, *supra*, at 27.

should persuade even the skeptic that virtually every case defining fourth amendment limits on police behavior arose only because a defendant objected to the use of certain evidence, forcing a court to decide whether the police had violated the defendant's constitutional rights when they obtained it.[176] Think, for example, of *Chimel v. California*,[177] *United States v. Katz*,[178] *Payton v. New York*,[179] and *Steagald v. United States*.[180] All of these cases involved objections to the use of evidence and all resulted in new limits on intrusive police conduct.[181] Thus, exclusionary rule litigation provides the principal occasion for the articulation of fourth amendment standards.[182] Without such litigation, it is likely that many of these fourth amendment issues would have remained unresolved.

The exclusionary rule not only prevents fourth amendment violations by eliciting path-breaking decisions by the Supreme Court, but also is indispensible to the development of law by the lower courts. Suppression litigation provides the principal occasion for appellate courts to clarify and refashion the broad principles of the fourth amendment; it also permits development of coherent standards through case-by-case adjudication of more fact-specific questions. This process is most evident in the cases that give content to the phrase "probable cause." Given both the myriad factual situations that the police encounter and the often unpredictable variations within even common pat-

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176. *E.g.*, Y. KAMISAR, W. LA FAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE CASES, COMMENTS AND QUESTIONS (5th ed. 1980); S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE CASES AND COMMENTARY (1980); L. WEINREB, LEADING CONSTITUTIONAL CASES ON CRIMINAL JUSTICE (1981).

177. 395 U.S. 752 (1969).

178. 389 U.S. 347 (1967). It is important to recognize that exclusionary rule litigation not only provides the occasion for developing fourth amendment standards of reasonableness, but also the occasion for deciding what sorts of governmental intrusions and surveillance constitute a search or seizure, and are thus subject to constitutional restraints and judicial scrutiny. As technological advances result in ever more "frightening paraphanalia which the marvels of an electronic age . . . visit upon human society," Silverman v. United States, 365 U.S. 505, 509 (1961), what privacy we have is increasingly threatened. Continuing exclusionary rule litigation that defines a "search" thus becomes all the more essential to the protection of that privacy. As Professor Amsterdam puts it, "I can think of few constitutional issues more important than defining the reach of the fourth amendment—the extent to which it controls the array of activities of the police. . . . the amount of power that it permits its police to use without effective control by law." Amsterdam, *supra* note 88, at 377.

179. 445 U.S. 573 (1980).

180. 101 S. Ct. 1642 (1981).

181. Steagald v. United States, 101 S. Ct. at 1645 (defendant moved to suppress unlawfully-seized evidence); Payton v. New York, 445 U.S. at 577 (same); Chimel v. California, 395 U.S. at 754 (defendant objected to admission into evidence of unlawfully-seized property); United States v. Katz, 389 U.S. at 348 (defendant objected to use of unlawfully-intercepted phone conversations).

182. The case law abounds with examples of the developmental benefits of the exclusionary rule. In Chimel v. California, 395 U.S. 752 (1969), for example, the Court held that a warrantless search incident to a valid arrest may extend only to the area within the suspect's immediate control. *Id.* at 763. In so holding, the Court overruled United States v. Rabinowitz, 339 U.S. 56, 59, 64 (1950) (one hour search of defendant's office, including desk, safe, and files, justified as incident to valid arrest). 395 U.S. at 768. Similarly, the Court in United States v. Katz, 389 U.S. 347 (1967), held that the use of an electronic eavesdropping device attached to the outside of a phone booth constituted an unreasonable search under the fourth amendment. *Id.* at 354. The *Katz* Court refused to follow the holding of Olmstead v. United States, 277 U.S. 438 (1928), that the fourth amendment applies to eavesdropping only when an actual physical invasion has occurred. 389 U.S. at 353. Finally, it was only after the exclusionary rule was applied to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961), that the Court had occasion to address the issue of just how much of the fourth amendment applied to state officials through the fourteenth amendment. In Ker v. California, 374 U.S. 23, 33 (1963), the Court ruled that it applied in full.

terns, reducing probable cause to a set formula is an impossible task.[183] Nevertheless, by deciding fourth amendment cases, courts are able to define probable cause more precisely. Thus, through this continual refinement, the police can become more certain of when probable cause exists and when it is lacking.

Fourth amendment case law in the District of Columbia provides one example of the developmental benefits of the exclusionary rule. When a police officer observes a suspected drug deal, he confronts a recurring dilemma. When he sees an interchange between people on a sidewalk, particularly in a high drug-use area of the city, he is justifiably suspicious. Yet he may not actually see any identifiable substance change hands. Moreover, the brief detention and interrogation that *Terry v. Ohio*[184] permits in these circumstances is unlikely to yield anything but denials. Unless the officer can act, however, the sale of drugs may continue with impunity. Thus, although the case law recognizes the significance of other factors such as the particular officer's expertise in recognizing narcotics transactions,[185] the suspect's reaction to an approaching officer,[186] and the reputation of the area as one in which narcotics are prevalent,[187] the District of Columbia Court of Appeals has developed a practical test. Generally, if the officer sees a suspect pass something in return for money under otherwise suspicious circumstances, he may arrest.[188] If he sees only a one-way transfer, however, he may not.[189]

Another recurring close question of probable cause arises when a police officer sees someone carrying property down the street, but has no knowledge of a particular theft to which the property can be linked. In this situation, the case law holds that the officer may not seize the property or arrest the person even if *Terry* questioning elicits evasive responses.[190] Appellate decisions do,

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183. The authors do not share Dworkin's dismay that the Supreme Court has been unable to condense all of probable cause into a few easily stated and applied rules. *See* Dworkin, *supra* note 103, at 329, 367. Probable cause issues arise in so many different settings and involve so many potential variations that any comprehensive set of rules would be too rigid to encompass all the relevant considerations.

184. 392 U.S. 1 (1968); *see* note 118 *supra* and accompanying text (discussing police conduct that is permissible on less than probable cause).

185. *See* Munn v. United States, 283 A.2d 28, 30 (D.C. 1971) (narcotics agent's experience with drug transactions relevant to finding of probable cause to arrest); *cf.* Bell v. United States, 254 F.2d 82, 85-86 (D.C. Cir.) (officer's experience relevant to finding probable cause to arrest), *cert. denied*, 358 U.S. 885 (1958).

186. *See* Tobias v. United States, 375 A.2d 491, 494 (D.C. 1977) (flight of suspect upon approach of officer relevant to assessment of probable cause).

187. *See* Peterkin v. United States, 281 A.2d 567, 568 & n.4 (D.C. 1971) (frequency of drug traffic in particular area may be relevant to assessment of probable cause), *cert. denied*, 406 U.S. 922 (1972).

188. *See id.* at 568-69 (transfer of substance in bottle in return for cash in high drug activity area provided probable cause to arrest).

189. *See* Vicks v. United States, 310 A.2d 247, 249 (D.C. 1973) (transfer of money without two-way exchange insufficient grounds for probable cause to arrest); Gray v. United States, 292 A.2d 153, 155-56 (D.C. 1972) (mere transfer of money not ground for probable cause).

The Metropolitan Police Department's General Counsel's Office transmits teletype messages for dissemination to all officers that summarize and analyze decisions such as these as soon as they are reprinted. *See* Teletype Message No. 31-428 (Oct. 26, 1981) (describing probable cause test established by District of Columbia Court of Appeals in Howell v. United States, 109 Daily Wash. L. Rep. 2049 (D.C. Aug. 4, 1981)) (copy on file at *Georgetown Law Journal*). The teletype message is read at rollcall for the week after it is issued. *Id.*

190. *See* United States v. Pannell, 383 A.2d 1078, 1079-80 (D.C. 1978) (no probable cause to arrest or seize property even when *Terry* questioning of suspect carrying television on street heightens officer's

however, tell the police what additional information provides probable cause justifying a search or arrest. Courts have upheld arrests and seizures when the police saw the defendant appear to look for something to steal before he reappeared carrying the suspect property,[191] when the property bore distinctive markings of ownership obviously placed there by someone other than the suspect and the suspect ran when the officer approached,[192] and when the policeman offered a detailed description of the suspicious conduct he observed before arresting the suspect and the suspect obviously lied in answering the officer's questions.[193]

These appellate decisions provide valuable guidance to police concerning when they may or may not act. Although the opinions may fall short of providing fool-proof formulas, they do draw sensible lines that the police can be expected to understand and observe, if they are motivated to do so. Thus, these standards themselves prevent violations of fourth amendment rights, for they give the police a reasonably clear message of when, despite their suspicions, the law does not permit arrest. Such specific standards develop only through case-by-case adjudication of fourth amendment issues.

By functioning as the primary mechanism through which the courts develop and articulate the limits of the fourth amendment itself, the exclusionary rule plays an indispensible role in preventing fourth amendment violations.[194] Although this point appears obvious, critics and courts have generally overlooked this benefit of the rule when balancing its advantages against its costs.[195] Yet clarifying what the police may and may not do can result in enor-

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suspicions); Campbell v. United States, 273 A.2d 252, 253, 255 (D.C. 1971) (no probable cause to arrest if suspect carrying television and screwdriver, even when denies ownership of screwdriver during brief questioning); Daugherty v. United States, 272 A.2d 675, 676 (D.C. 1971) (no probable cause to copy serial and model numbers of television suspect carrying on street).

191. *See* Nixon v. United States, 402 A.2d 816, 818-19 (D.C. 1979) (probable cause to arrest when suspect looked intently into parked cars in high crime area, reappeared later carrying box concealed in newspaper, and replied suspiciously to brief questioning).

192. *See* Edwards v. United States, 379 A.2d 976, 977-78 (D.C. 1977) (probable cause to arrest when suspect carrying property in pillow case with mark of school in deserted area late at night and fled when officers approached and identified themselves).

193. *See* Wray v. United States, 315 A.2d 843, 845 (D.C. 1974) (probable cause to arrest when detailed report of suspicious conduct observed by officer and suspect obviously lied during *Terry* questioning).

194. The exclusionary rule contributes to the development of fourth amendment law not only in situations involving arrests and searches made without probable cause, but also in the context of warrants. If an officer knows that both the issuing magistrate and a trial judge at a suppression hearing might scrutinize his affidavit, he will likely be more careful in ascertaining and stating his grounds for probable cause before he acts. The exclusionary rule also discourages the magistrate-shopping that might occur if there were no possibility of examination of an affidavit in support of a warrant at a later hearing. Further, the magistrate is likely to take more care in determining the existence of probable cause if the possibility of later scrutiny exists. Finally, a challenge to the magistrate's finding of probable cause aids in the development of fourth amendment law, particularly as certain constitutional issues, such as requirements for informants, arise most commonly when the police act with warrants. Admittedly, the law that the Supreme Court has fashioned in this area is not as coherent as it might be. *See, e.g.*, United States v. Harris, 403 U.S. 573, 581 (1971) (plurality opinion) (affidavit in support of warrant sufficient when it relates unnamed informant's personal observations and prior events within affiant's own knowledge); Spinelli v. United States, 393 U.S. 410, 416 (1969) (affidavit in support of warrant must indicate underlying circumstances showing informant's reliability and either how informant gathered information or detail sufficient to indicate information more than mere rumor); Aguilar v. Texas, 378 U.S. 108, 120 (1964) (affidavit must indicate basis for believing informant reliable). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.3.

195. Professor Oaks recognizes that "[i]t is . . . imperative to have a procedure by which courts can

mous benefits in protecting privacy.[196] Moreover, this process of judicial clarification can advance even when a court upholds police conduct. In *Dorman v. United States*,[197] for example, the United States Court of Appeals for the District of Columbia Circuit spelled out in detail the considerations that indicate the presence or absence of exigent circumstances sufficient to justify a warrantless entry of a house to make an arrest.[198] In this influential case,[199] the court defined exigent circumstances, although ultimately ruling that the evidence obtained was admissible.[200] Thus, important guidelines can emerge even when a

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review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review . . . ." Oaks, *supra* note 103, at 756. Yet when Oaks listed the means by which the rule might prevent fourth amendment violations, he considered only its deterrent effect in a literal sense, rather than its more broadly conceived preventive value. *Id.* at 709-19.

Similarly, the Supreme Court overlooked the interest in fourth amendment law development when it denied habeas corpus relief to convicts who had a full and fair hearing on fourth amendment claims in state court. Stone v. Powell, 428 U.S. 465, 482 (1976). The Court reasoned that the possibility of collateral review of an alleged fourth amendment violation would have little or no deterrent effect. *Id.* at 493. Balancing this assumed miniscule or nonexistent incremental deterrence against the costs of allowing collateral application of the exclusionary rule, the Court denied habeas corpus review. *Id.* at 494. The Court, however, failed to consider whether collateral review of fourth amendment claims was justifiable because such review contributes to the development of fourth amendment law.

Cover and Aleinikoff argue that federal habeas corpus review permits a useful dialogue between federal and state courts, each of which brings a different perspective to criminal law issues. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036, 1050 (1977). Given the different nature of prosecutions in each, state and federal courts are likely to develop different perspectives on crime, law enforcement, and the fourth amendment generally. Thus, federal habeas corpus review of state prisoners' fourth amendment claims is probably necessary to allow state and federal courts to apply their own strengths to common problems. In considering whether to limit federal habeas corpus review, the Supreme Court should have addressed this point.

To the authors' knowledge, the Supreme Court has never discussed this process of law development through the exclusionary rule. Justice Brennan, however, alluded to it in his dissent in United States v. Peltier, 442 U.S. 531, 554 (1975) (Brennan, J., with Marshall, J., dissenting) (Court's refusal to apply Almeida-Sanchez v. United States, 413 U.S. 266 (1973), retroactively "could stop dead in its tracks judicial development of Fourth Amendment rights"). *See generally* Geller, *supra* note 70, at 654-56 (discussing opportunity for judicial review provided by exclusionary rule).

196. Certainly, a trial court's suppression of evidence often results in no written opinion and no appeal. Such cases, however, generally involve flagrantly unlawful police conduct. In such cases, an opinion is not necessary to tell the police what they have done wrong. Here the exclusionary sanction works more like a penal sanction. When a court applies the exclusionary rule to such flagrant misconduct, each individual instance of suppression functions primarily through special deterrence. At the same time, the constant suppression of such evidence serves as a general deterrent by removing from the police an incentive to violate the law. Moreover, when flagrant misconduct is involved, the normative principle underlying the rule—that the government should play no part in unlawful activity—is a compelling justification for the exclusionary sanction.

197. 435 F.2d 385 (D.C. Cir. 1970) (en banc).

198. *Id.* at 392-93. The court listed the following seven considerations: (1) whether the suspected offense is especially violent; (2) whether the police have a reasonable belief that the suspect is armed; (3) whether there are more grounds for probable cause than the minimum necessary to obtain a warrant; (4) whether the officers have a strong reason to believe the suspect is on the premises; (5) whether the suspect is likely to escape unless promptly apprehended; (6) whether the entry is peaceable; and (7) whether entry is during the day or night. *Id.*

Similarly, courts have developed limits for administrative searches while determining the admissibility of evidence in a criminal case. *See* Michigan v. Tyler, 436 U.S. 499, 510 (1978) (no warrant required to enter burning premises and remain for reasonable time to investigate; additional entries necessitate compliance with warrant requirements for administrative searches).

199. *See, e.g.,* United States v. Acevedo, 627 F.2d 68, 70 (7th Cir. 1980) (utilizing *Dorman* criteria for determining presence of exigent circumstances sufficient to justify warrantless entry); United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978) (same); United States v. Campbell, 581 F.2d 22, 26 (2d Cir. 1978) (same).

200. 435 F.2d at 392-93.

court declines to suppress evidence.

Empirical studies that seek to rebut the efficacy of the rule as a deterrent often emphasize the substantial number of constitutional violations, as measured by successful motions to suppress, that occur despite the threat of the exclusionary sanction.[201] This measure, however, is fundamentally flawed. An increase in the number of successful motions to suppress is consistent with development of fourth amendment law. It may simply reflect an increased willingness of the defense bar to challenge doubtful, but longstanding, police practices like those in *Prouse*. Thus, more successful motions to suppress may be filed at the same time that the number of unreasonable searches or seizures decreases. Moreover, as courts tighten constitutional restraints on police, more constitutional violations will be recognized as such, even though police will generally heed new fourth amendment law. Just as no problem of black unemployment existed until slavery was abolished, so no fourth amendment violations existed until the courts gave meaning to the amendment in the course of litigation spawned by the exclusionary rule.[202]

D. THE ALTERNATIVE OF A TORT REMEDY

While an effective tort remedy would be a much needed supplement to the exclusionary rule,[203] such a remedy, even if it could be implemented,[204] would be an inadequate substitute.[205] This is because the exclusionary rule is essential to the development of fourth amendment law. Fourth amendment violations simply generate little litigation not related to suppression of evidence. *Delaware v. Prouse*[206] again provides a valuable example of this. Without the exclusionary rule, it is improbable that the Court would have determined that random traffic stops constitute unreasonable seizures within the fourth amend-

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201. *See* note 116 *supra* (studies of effectiveness of exclusionary rule).

202. So also does the measure of per capita income within a country go down as its infant mortality rate is reduced.

203. The exclusionary rule has the obvious drawback that it only provides a remedy for fourth amendment violations that result in the seizure of incriminating evidence. A tort remedy is therefore needed as a supplement to the exclusionary rule.

204. The possibility that legislatures will develop such a remedy is remote. As Professor Amsterdam has noted:

> Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigaton by the police. Even if our growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.

Amsterdam, *supra* note 88, at 378-79.

205. Professor Dellinger has argued that the unqualified language of the fourth amendment—that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"—prohibits government from "buy[ing] itself out of having to comply with the constitutional commands" simply by paying to do so through tort damages. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972). This is a powerful argument in favor of the exclusionary rule when there has been a knowing and intentional violation of fourth amendment rights. When government agents have acted unconstitutionally but in good faith, however, the government is less clearly buying itself out of compliance with constitutional restraints when its pays tort damages. Nevertheless, as this article argues, in all other respects tort damages are peculiarly inappropriate, and the exclusionary rule peculiarly necessary, when good faith, close to the line, police misconduct is involved.

206. 440 U.S. 648 (1979).

ment. Despite this important developmental role, critics of the exclusionary rule have suggested the alternative of a tort remedy.[207] Yet providing the victim of an illegal search or seizure with redress in a separate civil action would not serve the purpose of developing fourth amendment law.[208]

A stop on the highway may be inconvenient, and even humiliating, and standardless stops can easily become capricious or discriminatory. But, once the stop is over, most people would continue on their way, because the per-

207. One danger of unchecked police investigatory activity is the likelihood that searches and seizures will be conducted in an arbitrary and discriminatory manner. By requiring that police have reason to single out a particular individual or premesis before they arrest or search, the probable cause and warrant requirements abate this danger. Some commentators have persuasively argued that an additional mechanism for minimizing the dangers of arbitrary police conduct would be to require that intrusive police action be undertaken pursuant to comprehensive departmental regulations. *See* Amsterdam, *supra* note 88, at 417-23, 436-38 (suggesting such regulation as additional requirement of fourth amendment); Kaplan, *supra* note 131, at 1050 (suggesting that exclusionary rule not apply where "the police department in question has taken seriously its responsibility to adhere to the fourth amendment" by educating and regulating its officers). *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. (1967).

208. In his dissent in Wolf v. Colorado, 338 U.S. 25 (1949), Justice Murphy addressed the issue of alternatives to the exclusionary rule, discussing both criminal and civil actions against police officers who have violated a person's fourth amendment rights. *Id.* at 41 (Murphy, J., with Rutledge, J., dissenting). Justice Murphy emphasized some considerations that make a tort action an inadequate remedy: the difficulty of obtaining punitive damages, the variations in state rules limiting damages, the admissibility of the plaintiff's reputation, the common requirement of physical harm, the difficulties in collecting from often "judgment-proof" officers, and the possibility that the use of evidence seized in a criminal trial may be a defense in a tort suit. *Id.* at 43-44.

There are additional difficulties with a tort remedy not mentioned by Justice Murphy, including the fear of reprisal for suits against the police and the likelihood of jury prejudice in favor of officers. *See* Geller, *supra* note 70, at 692 (suggesting that fear of reprisals prevents civil suits against police); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1388-89 (1981) (claimant must run risk of reprisals from police and prosecutor; in addition, juries historically sympathize with police). *See also* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). On the other hand, there have been some significant changes in the law since Justice Murphy wrote, which enhance the possibility of recovering against governmental entities for the torts of their employees. In 1974, for example, the Federal Tort Claims Act (FTCA) was amended to permit actions against the federal government arising out of a federal officer's assault, battery, false imprisonment, abuse of process, or malicious prosecution. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (amending 28 U.S.C. § 2680(h) (1970)). *See generally* Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803 (1981). In addition, many state statutes are available to persons seeking redress against state officers for constitutional violations. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 450 n.13 (1978) (citing statutes); Schroeder, *supra*, at 1386-87. The Supreme Court has also opened paths for recovery against officers who violate the Constitution. In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Court held that a municipality may be liable under 42 U.S.C. § 1983 (1976 & Supp. III 1979) for the torts of its employees. 436 U.S. at 690. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court ruled that municipalities may not assert the good faith of their officers as a defense to a section 1983 claim. *Id.* at 650-51, 655-56.

Nevertheless, many obstacles block the plaintiff's path to recovery of tort damages. It has been held, for example, that under the FTCA an individual agent, as well as the government, may utilize a defense of "good faith and reasonable belief in the legality of . . . [the agent's] conduct." Norton v. United States, 581 F.2d 390, 397 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978); *cf.* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972) (valid defense in *Bivens* action against federal officer that agent acted in good faith with reasonable belief in validity of arrest and search), *on remand from* 403 U.S. 388 (1971). Furthermore, in order to recover against a municipality under section 1983, a plaintiff must demonstrate that the constitutional infringement was the result of governmental policy or custom, not merely the misdeed of an individual officer. Monell v. Department of Social Services, 436 U.S. at 694. Thus, even though there now exist potentially more effective tort remedies for egregious police misconduct, these remedies are inherently unsatisfactory alternatives to the exclusionary rule as a mechanism for developing fourth amendment law.

sonal inconvenience and intrusion are slight. Thus, damages in most tort actions would be only nominal. Therefore, although random traffic stops exact a high cumulative societal cost, and consequently demand fourth amendment protection, it is unlikely that a victim would have challenged the procedure in a tort action.[209] Many other privacy interests that demand fourth amendment protection fall in the same class.

Further, the probability of recovering damages in a tort action is minimal when, as in *Prouse*, the conduct of the police did not clearly violate a previously articulated legal standard. If a police officer's conduct is not manifestly unlawful, he could probably shield himself from tort liability by asserting some form of good faith defense.[210] Under *Pierson v. Ray*,[211] a good faith defense is available to state officers in federal civil actions brought under 42 U.S.C. § 1983;[212] such a defense is almost certainly available to federal officers in federal actions under the fourth amendment itself.[213] Thus, even if a tort remedy were effective when police conduct is flagrantly unlawful, that remedy would be useless to those challenging police conduct that had not previously been held unlawful.[214]

In such situations, a tort remedy would be not only unavailable but also undesirable. Critics of the exclusionary rule who would replace it with sanctions aimed directly at the offending officer often miss the point that if such sanctions were viable, they would deal a far more crippling blow to law enforcement than does the mere exclusion of illegally-seized evidence.

Under the probable cause standard police should operate close to the limits of behavior permitted by the fourth amendment. When probable cause is absent, police may not, and should not, arrest or search. When probable cause exists, however, they not only may act,[215] but generally should search or ar-

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209. A contingent-fee lawyer would be unlikely to represent a client whose constitutional rights had been violated in such a situation because of the unpredictability of damages. Moreover, it is doubtful that the same client would be willing to assume possibly high legal fees in order to bring an action.

210. A good faith defense does exist in civil actions against officials pursuant to 42 U.S.C. § 1983 (1976). By examining the application of this defense, one author attempted to predict the effects of a good faith exception to the exclusionary rule in criminal proceedings. Hoopes, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 916 (1978). Hoopes concluded that a good faith exception could adequately protect a defendant's fourth amendment rights if problems of burdens of proof and the standard for determining what actions are indeed in good faith were resolved. *Id.* at 951. Hoopes suggested, however, that application of the civil good faith defense results in an emphasis on the officer's interpretation of the facts and that a similar result in a criminal proceeding would be "inconsistent with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer." *Id.*

211. 386 U.S. 547 (1967).

212. *Id.* at 557; *see* note 210 *supra*.

213. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that although Congress had provided no tort remedy for a violation of the fourth amendment, such a violation gave rise to a cause of action for money damages. *Id.* at 397. On remand, the United States Court of Appeals for the Second Circuit held that proof of good faith was a defense to such an action. 456 F.2d 1339, 1348 (2d Cir. 1972).

214. This would also be true when a suit is brought against a governmental entity. *See* note 208 *supra*.

215. Occasionally an arrest or search on probable cause is nevertheless held to be unreasonable. For example, in Filer v. Smith, 96 Mich. 347, 55 N.W. 999 (1893), the Supreme Court of Michigan allowed a claim for false arrest, stating that the police had a duty to collect additional facts when further investigation could quickly and easily increase or dispel probable cause. *Id.* at 354-55, 55 N.W. at 1002; *see* 1

rest.[216] Under the threat of sanctions imposed directly on the individual officer, however, officers may forbear from acting, even when they think they have the right, for fear that those who review their actions will disagree. This additional deterrence at the margin is an unnecessary social cost.

Thus, not only is civil litigation for damages often impractical, it is also an undesirable device for articulating and clarifying fourth amendment rights. If civil litigation were a victim's only recourse, the spot check issue in *Prouse*, for example, would almost certainly remain unresolved. Because William Prouse challenged this practice, albeit for the selfish motive of avoiding a conviction for drug possession, society has benefitted; the decision in *Prouse* has likely averted countless invasions of constitutional rights on our highways.[217] In contrast to civil remedies, the exclusionary rule exacts a peculiarly appropriate price for conduct that exceeds constitutional limits: it deprives the government of the precise evidence that would have been unavailable had its agents respected those limits.[218] Further, it provides police departments with an in-

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LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.2(d), at 467-68 (discussing *Filer v. Smith*). More recent fourth amendment decisions seem to have ignored this holding.

There are a few other scattered decisions ruling certain kinds of searches unreasonable despite probable cause to conduct them. One court, for example, has ruled that surgery to remove evidence of a crime is illegal unless consent is obtained. Adams v. State, 260 Ind. 663, 668, 299 N.E.2d 834, 838 (1973), *cert. denied*, 415 U.S. 935 (1974). Other courts balance the competing interests to determine if surgery may be compelled. *See* United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976) (en banc) (surgery to remove bullet allowed when no danger to defendant), *cert. denied*, 429 U.S. 1062 (1977); Allison v. State, 129 Ga. App. 364, 365, 199 S.E.2d 587, 588-89 (1973), *cert. denied*, 414 U.S. 1145 (1974). *See also* Schmerber v. California, 384 U.S. 757, 770 (1966) (removal of blood allowed while defendant unconscious because delay would allow destruction of evidence). Occasionally, state courts have ruled unconstitutional particularly intrusive searches of homes in pursuit of evidence of minor crimes. *See* McMahon's Administrator v. Draffan, 242 Ky. 785, 787-79, 47 S.W.2d 716, 718-19 (1932) (forcible, malicious search unreasonable); Buckley v. Beaulieu, 104 Me. 56, 60-61, 71 A. 70, 72 (1908) (destruction of interior walls during search of home unreasonable).

216. When one is required, and there are no exigent circumstances, a warrant must be secured before acting.

217. *See* notes 166-72 *supra* and accompanying text (discussing police reactions to *Prouse*).

218. Viewing the exclusionary rule from a different perspective, critics of the rule have pointed out that the sanction is peculiarly inappropriate, for it is geared neither to the gravity of the police misconduct nor to the seriousness of the crime with which the defendant is charged. This has led some commentators to suggest that the rule should apply only to "substantial violations." *See* MODEL CODE OF PRE ARRAIGNMENT PROCEDURE § 290.2(4) (Proposed Official Draft, 1975); TASK FORCE REPORT, *supra* note 31, at 55 (any remedy for violation of constitutional right should be proportional to magnitude of violation). Similarly, others have suggested that it be limited to "less serious" crimes. *See* Kaplan, *supra* note 131, at 1046 (discussing modification to rule that would preclude its application in most serious cases—treason, espionage, murder, armed robbery, and kidnapping). *But see* Allen, *supra* note 64, at 36 (disproportion exists between misbehavior and remedy; nevertheless, limitation to less serious crimes gives police license to proceed in some areas without legal restraint). Justice Rehnquist based his proposal that even if the exclusionary rule is to be retained in the federal courts it should not apply to the states on the fact that state crimes tend to be the most serious ones. California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). Still others have suggested that in deciding the fourth amendment issue the seriousness of the suspected crime should be weighed in the balance. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63.

It is also true that application of the exclusionary rule does not always put the government in precisely the position it would have been if its agent had stayed within constitutional bounds, for sometimes the police could have developed probable cause had they pursued their investigation lawfully. Nevertheless, when further avenues of investigation are open to the police, the exclusionary rule simply encourages the police to pursue them. In such cases, its costs to law enforcement should be minimal. When an investigation can only be pursued by trampling on constitutional rights, the exclusionary rule merely imposes on law enforcement the costs that the Constitution itself imposes.

centive to teach officers those limits, and to demand conformity to them. At the same time, the threat of the exclusionary sanction will not deter the individual policeman from acting when he thinks his actions are lawful.

E. SUMMARY

In light of recent Supreme Court decisions, the exclusionary rule is now premised on deterrence of police misconduct. Both courts and critics, however, have focused little attention on the precise quantum of deterrence necessary to justify the continued existence of the rule. The probable cause standard of the fourth amendment offers an appropriate measure of how effectively the exclusionary rule need deter to justify its continued existence as a purely prophylactic measure.

The exclusionary rule operates as a special deterrent, and as a general deterrent. The rule also operates in a more complex way to deter fourth amendment violations. Its very existence forcefully conveys to the police the importance that society attaches to the constitutional constraints that govern their actons. The threat that it will be applied when constitutional violations occur induces police departments to instruct their officers in fourth amendment law, and to train them to abide by that law. At the same time, exclusionary rule litigation provides the primary opportunity for the courts to announce what the fourth amendment requires, and to develop guidelines for the police to meet those requirements. A court's statement of what is lawful and what is unlawful conduct carries its own moral force,[219] and is backed by the threat of the exclusionary sanction. Police department responses to *Delaware v. Prouse* demonstrate both the success of the exclusionary rule as a systemic deterrent and the contribution of the rule to the development of fourth amendment law.

Finally, the exclusionary rule not only effectively deters police misconduct but also provides the best device for enforcing the fourth amendment. Exclusive reliance on the alternative of a tort remedy would derail the development of fourth amendment law. If it succeeded as a deterrent to illegal police practices, it would also deter legal police conduct that is close to the line of illegality to a far greater extent than does the exclusionary rule. Thus, as measured against the standards of the fourth amendment itself, the exclusionary rule remains an essential mechanism for deterring illegal police conduct. As this article will argue, a good faith exception would subvert this important function.

IV. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: AN EXAMINATION OF *UNITED STATES V. WILLIAMS*

As our review of the exclusionary rule's evolution has indicated, the dominant rationale for the application of the rule is now deterrence of illegal police conduct. Nevertheless, judges and commentators continue to quarrel over whether the exclusionary rule does in fact deter, and whether this deterrence justifies the consequent costs of excluded evidence and freed criminals.[220]

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219. *See generally* F. ZIMRING & G. HAWKINS, *supra* note 138 (moral force of law as deterrent to its violation).

220. *See generally* note 103 *supra* (citing commentary on deterrent effect of exclusionary rule).

Recently, the exclusionary rule has come under attack as providing a remedy that is often excessive in proportion to the magnitude of the fourth amendment violation.[221] In its August, 1981 report, the Attorney General's Task Force on Violent Crime found that "[t]he fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law . . .—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial."[222] Because "the rule necessarily fails in its deterrent purpose" when applied to the "good faith" efforts of police officers to comply with the law, the Task Force recommended that the Attorney General support a good faith exception.[223]

In support of its recommendation, the Task Force cited only the deterrence rationale expressed in *Mapp* and the Fifth Circuit's en banc decision in *United States v. Williams*.[224] Moreover, the Task Force did not qualify its recommendation in any way to indicate possible shortcomings of the good faith exception, either conceptually or as the Fifth Circuit applied it. Because a good faith exception may very well negate the most important advantages of the exclusionary rule, these weaknesses must be recognized and addressed. Using the *Williams* decision as an example of the good faith exception in theory and in practice, this section questions the exception's underlying premise, criticizes both its substantive content and its procedural application, and doubts the *Williams* court's precedential support for its adoption. After discussing the exception at length in the *Williams* context, the section focuses on the jurisprudential problems that are inherent in a good faith exception both theoretically and as the *Williams* court formulated it.

A. THE DECISION IN *WILLIAMS*

In June, 1976, Special Agent Paul Markonni of the Drug Enforcement Administration (DEA) arrested Jo Ann Williams in Toledo, Ohio, for possession of heroin in violation of the Controlled Substances Act.[225] In March of the following year, after the district court denied her motion to suppress the her-

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221. *See generally* Posner, *supra* note 44, at 7; TASK FORCE REPORT, *supra* note 31, at 55-56.

222. TASK FORCE REPORT, *supra* note 31, at 55. If this passage implies that the courts have become increasingly expansive in their application of the exclusionary rule, in comparison with years past, it is plainly misleading. *Compare* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Court held invalid grand jury subpoenas based on illegally-seized evidence) *and* note 53 *supra* (discussing broad reach of exclusionary rule in early cases) *with* United States v. Calandra, 414 U.S. 338, 354 (1974) (Court upheld grand jury questions based on evidence obtained from unlawful search and seizure).

223. *Id.* at 55-56.

224. *Id.* at 55 (citing Mapp v. Ohio, 367 U.S. 643, 656 (1961); United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981)).

225. United States v. Williams, 622 F.2d 830, 833 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

> 21 U.S.C. § 841(a)(1) (1976), the provision Williams allegedly violated, provides:
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .
>
> *Id.*

oin, Williams pleaded guilty and was sentenced to three years imprisonment.[226] Subsequently, she appealed the denial of her suppression motion[227] and was released on bond pending appeal.[228] As a condition of her release, the court imposed travel restrictions that required Williams to remain in Ohio.[229]

In September, 1977, Agent Markonni, while on temporary assignment at Atlanta International Airport, recognized Williams as she disembarked from a nonstop flight from Los Angeles.[230] Markonni was aware of the travel restrictions on Williams' appeal bond.[231] He also knew that her Ohio conviction was based on heroin that she had obtained in Los Angeles.[232] Acting on the basis of this information, he approached her, identified himself, and asked her for identification and her airline ticket.[233] The ticket showed that Williams was bound for Lexington, Kentucky.[234] When Markonni asked her if she had permission to travel outside Ohio, Williams responded, "No, this is the first time."[235] When Markonni asked her why she was going to Lexington, she replied that she now lived there.[236] Markonni then arrested her for violating the travel restriction on her appeal bond and ordered other agents to search her incident to the arrest.[237] The search uncovered a packet of heroin in her coat pocket.[238] Markonni then arrested Williams again—this time for violating the Controlled Substances Act, the same offense he had arrested her for fifteen months earlier in Toledo.[239]

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226. 622 F.2d at 833.

227. *Id.*

228. *Id.* Such release is authorized by 18 U.S.C. § 3148 (1976), which provides in part:

> A person . . . (2) who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

Id.

229. 622 F.2d at 833. The impositon of travel restrictions as a condition of release pending appeal is authorized by 18 U.S.C. § 3146(a)(2) (1976), which provides:

> (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:
>
> . . . .
>
> (2) place restrictions on the travel, association, or place of abode of the person during the period of release . . . .

Id.

230. 622 F.2d at 834.

231. *Id.*

232. *Id.* at 834 n.8.

233. *Id.* at 834.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* The next day, Markonni obtained a search warrant for Williams' luggage based both on the

In November, 1977, Williams was indicted.[240] At a pretrial hearing, she argued that Markonni had no authority to arrest her for violating bond restrictions,[241] and moved to suppress all evidence of the heroin.[242] The district court agreed and suppressed the evidence;[243] the government appealed.[244]

On appeal before a panel of the United States Court of Appeals for the Fifth Circuit, the government contended that Agent Markonni's arrest of Williams was lawful on two theories.[245] First, it argued that Markonni had probable cause to arrest Williams for bail jumping.[246] The panel rejected this argument, holding that bail jumping must involve a willful failure to appear in court, and that Markonni had no reason to believe that Williams had missed a court ap-

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heroin found in her coat and Markonni's past experience with her. *Id.* at 834-35. The ensuing search of her luggage revealed more heroin. *Id.* at 835.

240. The indictment contained two counts: one based on the heroin found on her person; the other based on the heroin found in her luggage. *Id.*

241. *Id.*

242. *Id.* She also contended that the heroin recovered from her luggage was inadmissible as the fruit of the initial unlawful search of her coat. *Id.*

243. *Id.*

244. United States v. Williams, 594 F.2d 86, 97-98 (5th Cir. 1979), *rev'd*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

245. 594 F.2d at 90. A discussion of the considerations relevant to the determination of the initial question before the *Williams* court is necessary to an understanding of the court's good faith inquiry. The validity of Williams' arrest turns on the interplay of three statutes: 21 U.S.C. § 878(3) (1976), which defines the authority of DEA agents to arrest without a warrant; the Bail Reform Act, 18 U.S.C. §§ 3141-3152 (1976), which establishes the framework for release on bail; and 18 U.S.C. § 401(3) (1976), which defines the power of a court to punish for contempt.

Under 21 U.S.C. § 878(3), Markonni could lawfully arrest Williams if she was committing an offense against the United States in his presence or if he had probable cause to believe she had committed or was committing a felony. Here, it was undisputed that Williams was violating a condition of her release on bond when she traveled outside Ohio without the court's permission, and that Markonni knew with certainty about the travel restrictions. The issue, therefore, was whether Williams' conduct constituted either an offense against the United States or a felony. Neither the Bail Reform Act nor 18 U.S.C. § 401(3), however, provide a ready answer to this question. Although 18 U.S.C. § 3146 explicitly gives the court power to impose conditions of release, including travel restrictions, it does not expressly establish criminal sanctions for violations of imposed conditions. The only express criminal penalty set out in the statute is for "bail jumping," an offense defined as the willful failure to appear in court as ordered. 18 U.S.C. § 3150 (1976). Williams, however, had not missed any court appearances, and Markonni had no reason to believe that she had. Nevertheless, Williams was susceptible to arrest. Under 18 U.S.C. § 3146(2), the judge who imposed the travel restriction is authorized to issue an arrest warrant upon violation of this condition. In this case, however, no such warrant was issued.

Another possible ground for arrest was that, by violating her travel restrictions, Williams was subject to the penalties of criminal contempt because the Bail Reform Act does not interfere with the court's power to punish for contempt. 18 U.S.C. § 3151 (1976). Whether Williams' violation of her travel restrictions necessarily constituted contempt under 18 U.S.C. § 401(3), however, is an open question. A literal reading of section 401(3) suggests that disobedience of a court order constitutes contempt, punishable by fine or imprisonment. *See* United States v. Williams, 622 F.2d at 836. It is arguable, however, that a court may use its discretion when dealing with a violation of a bond condition and should declare contempt of court only in extreme cases. *See* United States v. Williams, 594 F.2d at 93. Moreover, even if the violation constituted contempt, it is uncertain whether an arrest may be made without the court's first issuing a warrant. Because contempt is a violation against the court, the reasoning would go, only a court should be authorized to initiate the process leading to possible sanctions. If the court determines that it is appropriate to issue a warrant, a DEA agent would then be authorized to arrest. *See* 594 F.2d at 92-93 (courts, not DEA agents, are vested with power to punish bond violations; DEA agents have no implied arrest power under § 401(3)). In sum, determining the lawfulness of Markonni's arrest involves difficult questions of the scope of the Bail Reform Act and 18 U.S.C. § 401(3). Only if Williams' conduct can be interpreted as a criminal violation of the Bail Reform Act or criminal contempt under 18 U.S.C. § 401(3), and thus, be considered an offense against the United States or a felony under 21 U.S.C. § 878(3), can Markonni's arrest of Williams be lawful.

246. 594 F.2d at 90.

pearance.[247] Second, the government argued that although Markonni may have characterized his action as an arrest for bail jumping, it was grounded on his knowledge that Williams was violating a condition of her release and thus should be construed as an arrest for that violation, which the government maintained constituted a criminal offense.[248] The panel rejected this contention as well, holding that a violation of a bond condition "is not a criminal offense . . . but merely sets the judicial machinery in motion and empowers a court, not a DEA agent, to determine whether punitive action is warranted."[249] The panel concluded that although Markonni "had reason to believe defendant Williams was violating the conditions of her bond, he did not have probable cause to believe a *criminal offense* had been or was being committed . . . ."[250] The panel, therefore, affirmed the district court's order suppressing the heroin.[251]

Dissenting from the panel's decision, Judge Charles Clark argued that the exclusionary rule should not bar the fruits of Williams' arrest. He based his reasoning on two premises:

> The purpose of the exclusionary rule is to take away any temptation of law enforcement officials to knowingly violate the rights of citizens by denying to the public proof of criminal conduct disclosed by such wrongful police activity . . . . In order for the exclusionary rule to serve its deterrent purpose, the officer must act in a way he either knew or should have known was wrongful.[252]

Thus, in Judge Clark's view, Markonni did only what "any reasonable, practical officer would have considered the law required him to do,"[253] and therefore, suppression of the evidence would not have the appropriate deterrent effect.[254]

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247. *Id.* at 91-92.

248. *Id.* at 94.

249. The court held that a violation of a bond condition is not a criminal offense under section 3146(c). *Id.* at 93.

250. *Id.* at 95.

251. *Id.* The panel also suppressed the heroin seized pursuant to the warrant from Williams' suitcase as fruit of the illegal arrest. *Id.* at 95-96.

252. *Id.* at 97 (Clark J., dissenting).

253. *Id.*

254. *Id.* Although Judge Clark disagreed with the majority's holding that the evidence should have been suppressed, he did agree that Williams' arrest was "legally wrong." *Id.* In fact, Judge Clark suggested that Markonni might be civilly liable for his actions. "If this were a suit for false arrest," he wrote, "I would have no difficulty in concurring in the majority's impeccable reasoning." *Id.* Like other opponents of the exclusionary rule who have sought to make its elimination more palatable by suggesting that an effective tort remedy should replace it, Clark never explained why he would impose tort liability for a good faith fourth amendment violation when he would not apply the exclusionary rule to the fruits of the same violation. If, as Clark contended, Markonni did only what a reasonable, practical police officer would do, it would be unfair to hold him civilly liable.

In addition to this equitable and logical inconsistency, imposing civil liability makes little sense from a practical standpoint. It would have a much greater negative effect on police activity than applying the exclusionary rule. *See* notes 203-19 *supra* and accompanying text (discussing alternative tort remedy). If, as Judge Clark argues, suppressing evidence "may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal," 594 F.2d at 97-98, the prospect of personal liability from a tort action would have an even greater inhibitive effect on police officers and consequently exacerbate the problem Judge Clark perceives. *See* text accompanying notes 215-16 *supra* (discussing inhibitive effect of tort liability).

The Fifth Circuit, on its own motion, granted rehearing en banc.[255] Although the government had argued before the panel only that the arrest and search were lawful, it filed a supplemental brief urging the en banc court to adopt an exception to the exclusionary rule along the lines suggested in Judge Clark's dissent.[256] In an extraordinary disposition of the case, the en banc court simultaneously issued two separate opinions, each of which "command[ed] a majority of the court," and reversed the decision of the district court for "reasons assigned in these alternate resolutions."[257] Two special concurrences were filed, but none of the judges dissented; all twenty-four judges joined one of the two majority opinions, and five judges joined both.[258]

The first en banc majority opinion dealt solely with the lawfulness of Agent Markonni's conduct. In this opinion, the court reversed the district court and held: first, that a violation of a condition of release is criminal contempt; and second, that because criminal contempt is an offense against the United States, Markonni had authority to arrest Williams for that offense when she committed it in his presence.[259] On the basis of this reasoning, a sixteen-judge majority concluded that the heroin should not have been suppressed because Agent Markonni did not violate the fourth amendment.[260]

The thirteen-judge second majority[261] considered the determination of the arrest's validity unnecessary to the suppression question: "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though

255. 594 F.2d 98 (5th Cir. 1979).

256. *See* Supplemental Brief for Appellant on Rehearing En Banc 5-6, United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

257. 622 F.2d at 833.

258. *Id.* at 833, 840, 847, 848. Two judges who joined in the second majority opinion concurred specially to explain that the approach of that opinion was correct because it disposed of the case without addressing the constitutional question. *Id.* at 847-48 (Hill, J., with Fay, J., concurring specially). They stressed that it was proper to decide whether the fruits of the arrest were admissible under the good faith exception to the exclusionary rule, and thus avoid the constitutional issue whether the search was valid. *Id.* at 847.

Ten of the eleven judges who joined the first, but not the second, majority opinion also concurred specially. *Id.* at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., concurring specially). Noting that none of the twenty-four judges expressed any doubt that Williams' arrest was lawful, these judges contended that no alternative ground for a decision was necessary, and therefore judicial self-restraint was required. *Id.* They expressed regret that the case had been "utilized as a vehicle to disseminate a doctrine unnecessary to its decision." *Id.* at 851. The concurrence also questioned the second majority's premise that deterrence is the exclusive purpose behind the exclusionary rule. *Id.* at 849-50. Although the judges who joined the second special concurrence took issue with both the propriety of the second majority opinion and its premise concerning the purpose of the exclusionary rule, they did not address the "merit or lack of merit" of the good faith exception. *Id.* at 851. The concurrence did state, however, that the announcement of the good faith exception created "a host of interpretive problems" that warrant debate. *Id.* at 850 n.4.

Judge Henderson was the only judge who joined the first majority opinion, but who did not also join either the second majority or the special concurrence.

259. *Id.* at 836-39 (first majority opinion). The first majority reasoned that Williams' willful breach of her bond restriction constituted contempt under 18 U.S.C. § 401(3). 622 F.2d at 836. Although Markonni was not authorized to punish this violation pursuant to section 401(3), which only empowers a court to act, the first majority held that Markonni could arrest Williams under 21 U.S.C. § 878(3) for her conduct, which it deemed to have been an offense against the United States. 622 F.2d at 839.

260. *Id.*

261. Subsequent references to *Williams* or the *Williams* court in this article are to this second majority opinion and the thirteen judges who supported it.

mistaken, belief that they are authorized."[262] Thus, in adopting this good faith exception to the exclusionary rule, the second majority also concluded that the heroin should not have been suppressed, but for a different reason. The second majority decided that although Agent Markonni may have violated Williams' fourth amendment rights, he acted reasonably and in good faith. Thus, despite any government illegality, the court concluded that the evidence should be admitted at trial against Williams.

The *Williams* opinion reflects the shortcomings of both the good faith exception itself and the Fifth Circuit's attempt to apply it. This article next examines these two problems, beginning with the flaws in the *Williams* court's application of the exception. These flaws stem primarily from the court's failure to apply its own test properly, but they are symptomatic of the difficulties that are inherent in the good faith exception to the exclusionary rule formulated by the *Williams* court.

B. THE COURT'S APPLICATION OF THE EXCEPTION

The initial problem with *Williams* is that the first majority's determination that Agent Markonni's arrest of Williams was lawful renders the alternate resolution by the second majority superfluous.[263] The difficulty here is not simply that either decision can be seen as dictum.[264] Rather, because the first opinion held that the arrest was lawful, the good faith, reasonable "misconduct" upon which the second majority based its holding never in fact occurred. With the precise nature of the "misconduct" undefined, it is impossible to determine whether a fourth amendment violation actually occurred, or even whether the mistake was reasonable and made in good faith.

The problem with such a notion is clear from the good faith approach itself: when a criminal defendant challenges police conduct by a motion to suppress, the court's application of the exclusionary rule must turn on whether the officer acted reasonably and in the good faith belief his actions were lawful. Thus, the good faith inquiry is dispositive of the suppression decision. A court applying this approach need *only* inquire into the reasonableness and good faith of the officer's action; like the *Williams* court. it need not determine conclusively whether these actions violated the defendant's fourth amendment rights.

The second difficulty with the *Williams* court's application of the good faith

262. *Id.* at 840 (second majority opinion).

263. This view was expressed in Judge Rubin's special concurrence and was supported by 10 of the Fifth Circuit's 24 then active circuit judges. 622 F.2d at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., concurring specially). A divergent view, however was taken by Judge Hill, who argued in a separate special concurrence that the second majority's approach was sensible because it allowed the court to address the admissibility of evidence without considering constitutional questions. *Id.* at 847 (Hill, J., with Fay, J., concurring specially). Now that the Fifth Circuit has been divided into two separate courts, the Fifth and Eleventh Circuits, the status of *Williams* may be uncertain.

264. In United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980), a three-judge panel of the Fifth Circuit described the second majority opinion in *Williams* as "dicta on limited good faith exception to [the] exclusionary rule." *Id.* at 420. The *Fitzharris* court was discussing possible justifications for a warrantless search of defendants' ranch, and mentioned *Williams* in a "*See also*" citation with the above parenthetical description. The *Fitzharris* opinion was written by Judge Henderson, who concurred in the first *Williams* majority opinion. The other panel members were Judge Rubin, who concurred in the first *Williams* opinion and also wrote the special concurrence attacking the second majority opinion, and Judge Reavley, who concurred in the second *Williams* majority opinion.

exception is related to the first. Because "[n]either Markonni's good faith nor [the arrest's] reasonableness" was challenged,[265] the *Williams* court did not conduct an analysis of Markonni's conduct. Obviously, the first majority's opinion made a remand for findings on Markonni's good faith and reasonableness unnecessary.[266] Nevertheless, the rationale of the good faith exception to the exclusionary rule requires that the second majority have made such findings. The Fifth Circuit's failure to consider Markonni's good faith and reasonableness deprived Williams of any opportunity to challenge his conduct. Williams, of course, had no reason to question Markonni's good faith or reasonableness because under then-existing law her burden was only to convince the court that Markonni had violated her constitutional rights.

Because the court never examined Markonni's actions one can only imagine what type of analysis the good faith exception mandates, or what kind of evidence Williams' defense counsel would have offered to challenge the application of the exception in this case. The good faith analysis is not difficult to hypothesize. The terms "reasonableness" and "good faith" suggest relatively straightforward standards: the former connotes an objective test; the latter, a subjective standard.[267] Nevertheless, an objective and subjective analysis of Markonni's actions in this case, when viewed in light of the evidence Williams' counsel could have introduced, points to the conclusion that his "misconduct" would not fall within a good faith exception.

Although the court failed to define clearly the nature of Markonni's misconduct, it did hint that his mistake was in believing that Williams' violation of her travel restriction constituted an offense against the United States.[268] If this had been Markonni's mistake, it would certainly have been an understandable one. As the *Williams* court pointed out, no court before the panel decision had confronted the question whether such a violation is an offense against the United States.[269] Thus, because of this uncertainty of the state of the law and because Markonni had authority to arrest for an offense against the United States,[270] his actions would have fallen within the scope of the good faith exception.

The record, however, which the *Williams* court conveniently ignored, indicates that Markonni's actual mistake had nothing to do with whether a bond violation constitutes an offense against the United States. Markonni's testimony at the suppression hearing demonstrates that the mistake he actually made was in thinking that Williams, by violating a condition of her release, had committed the felony of bail jumping, an infraction punishable under 18 U.S.C. § 3150.[271] The testimony is revealing:

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265. 622 F.2d at 847 (second majority opinion).

266. The first majority found that "the arrest . . . was legal, the search . . . proper and the heroin . . . was lawfully seized." *Id.* at 839 (first majority opinion). Because this opinion held the conduct lawful, there would be nothing to decide on remand.

267. This is not to say, however, that the tests will be easy to administer. *See* text accompanying notes 474-86 *infra* (discussing problems in administering *Williams* good faith exception).

268. 622 F.2d at 846 (second majority opinion).

269. *Id.*

270. *Id.*

271. 18 U.S.C. § 3150 (1976); *see* note 245 *supra* (discussing statute).

Q. You had not observed Jo Ann Williams in your presence commit any act which constituted a felony, did you?
A. I would have to say I did.
Q. And what was that, sir?
A. Well, because bail jumping and violating her bond restriction, as I understand it, is a felony, and everyone who is placed on bond is warned that violating bond restrictions or jumping bond is a felony punishable by up to five years in prison or up to a five thousand dollar fine.
Q. So it would be accurate for me to say then, sir, that at the time that you arrested Jo Ann Williams on September 28, 1977, at the Atlanta Airport, you observed a felony which you felt was the jumping of bail, is that correct, sir?
A. By being in violation of her bond restrictions.[272]

Such a mistake about the reach of section 3150 can hardly be considered "grounded in an objective reasonableness."[273] Section 3150 unambiguously applies only to willful failures to appear in court as ordered.[274] The Fifth Circuit traditionally has interpreted the statute as the plain language requires,[275] and the panel followed precedent when it addressed this issue.[276] Markonni had no reason to be unsure about the state of this area of the law. The language was plain, and the interpretation of the statute had been consistent. In fact, when the government reargued the case before the en banc court, it dropped the argument it had made to the panel that Markonni's arrest of Williams was justified under section 3150. Thus, Markonni's mistake was not objectively reasonable.

Further, if Markonni was unclear about the statute's meaning, it was unreasonable for him to fail to learn the scope of section 3150. If Markonni anticipated confronting Williams, and made himself aware of her travel restrictions, his failure to investigate whether a bail violation consititutes bond jumping before they met again in Atlanta also must be considered unreasonable.

The good faith exception also requires a court to assess the officer's subjective good faith. In *Williams*, the necessity of examining Agent Markonni's subjective good faith at the time of the arrest raises interesting possibilities that were never pursued in the trial court, perhaps because no one anticipated how the case later would be decided on appeal. It appears, however, that a searching inquiry into Markonni's subjective good faith in arresting Williams would have required examining his past record of arrests and searches. If Williams

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272. Record at 25-26, United States v. Williams, Cr. 77-305A (N.D. Ga. 1977).
273. 622 F.2d at 841 n.4a.
274. 18 U.S.C. § 3150 (1976) provides in part:

> Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required . . . shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal . . . after conviction . . . be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

Id.

275. *See* United States v. Bright, 541 F.2d 471, 474 (5th Cir. 1976) (essence of crime of bail jumping is willful failure to appear before court as ordered), *cert. denied*, 430 U.S. 935 (1977); United States v. Logan, 505 F.2d 35, 37 (5th Cir. 1974) (same).
276. 594 F.2d at 91.

had been given the opportunity to undertake this examination, an enterprising defense counsel would have learned that DEA Special Agent Paul J. Markonni is no fourth amendment neophyte. Numerous prior suppression cases have addressed the legality of his actions.[277] As the *Williams* court knew from the government's brief, the Sixth Circuit had already recognized Markonni's accomplishments as a fourth amendment trailblazer, and had noted that "Markonni has amassed an impressive drug enforcement record in Detroit, resulting in a number of opinions of this Court exploring the boundaries of permissible police activity in dealing with the difficult problem of drug trafficking."[278] Thus, a review of Markonni's fourth amendment career might shed some light on the inadvertency of his error in *Williams*.

Agent Markonni's work has involved policing airports for drug couriers.[279] In most of his early exploits, he relied on a straight-forward theory of probable cause, followed by a search incident to the arrest, to justify seizure of the sought-after evidence.[280] Although Markonni often has been successful, he

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277. We have found these additional cases reporting on Markonni's efforts, which have sometimes involved genuinely creative efforts to refashion fourth amendment law: United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981); United States v. Berry, 636 F.2d 1075, 1077 (5th Cir. 1981); United States v. Berd, 634 F.2d 979, 981 (5th Cir. 1981); United States v. Turner, 628 F.2d 461 (5th Cir. 1980); United States v. Canady, 615 F.2d 694 (5th Cir. 1980); United States v. Andrews, 600 F.2d 563, 565 (6th Cir. 1979); United States v. Roundtree, 596 F.2d 672, 673 (5th Cir. 1979); United States v. Elmore, 595 F.2d 1036, 1037 (5th Cir. 1979); United States v. Troutman, 590 F.2d 604, 605 (5th Cir. 1979); United States v. Lewis, 556 F.2d 385, 387 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717, 719 (6th Cir. 1977); United States v. Hunter, 550 F. 2d 1066, 1068 (6th Cir. 1977); United States v. Prince, 548 F.2d 164 (6th Cir. 1977); United States v. Pratter, 465 F.2d, 227, 229 (7th Cir. 1972); United States v. One 1976 Cadillac Seville, 477 F. Supp. 879, 880 (E.D. Mich. 1979); United States v. McClain, 452 F. Supp 195, 196 (E.D. Mich 1977); United States v. Coleman, 450 F. Supp. 433, 435 (E.D. Mich. 1978); United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich 1977); United States v. Miles, 425 F. Supp 1256 (E.D. Mich 1977); United States v. Allen, 421 F. Supp. 1372 (E.D. Mich. 1976); United States v. Floyd, 418 F. Supp. 721 (E.D. Mich. 1976); United States v. Griffin, 413 F. Supp. 178 (E.D. Mich. 1976); United States v. Scott, 406 F. Supp. 443 (E.D. Mich. 1976).

278. United States v. Wright, 577 F.2d 378, 379 (6th Cir. 1978), *cited in* Supplemental Brief for Appellant on Rehearing En Banc at 12 n.2, United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

279. Most of his cases have involved airport encounters. At one point Markonni estimated that he had made 175 arrests at the Detroit Metropolitan Airport alone. United States v. Allen, 421 F. Supp. 1372, 1374 n.1 (E.D. Mich. 1976).

One of Markonni's earliest cases involved a different type of work and raised issues unlike those of the airport cases that came later. In United States v. Pratter, 465 F.2d 227 (7th Cir. 1972), the court described a raid on a house occupied by two University of Indiana students to seize a package containing hashish that had been shipped to them from Bombay, India inside a plaster of paris statue. *Id.* at 228-29. All of the evidence found in the raid was suppressed, because the agents participating, among them Markonni, waited only a few seconds for a response to their knock at the door before rushing in. *Id.* at 232-33. The court, in an opinion by Judge (now Justice) Stevens, held that the agents had not been refused entry before their break in. *Id.*

Markonni, a minor actor in the drama, showed signs of the enterprising attitude that would stamp his later efforts. The "second or two," or "couple seconds," that in the lead agent's testimony separated their announcement of authority and purpose from the break-in became, when Markonni testified, "[s]everal seconds; I would say probably ten seconds, ten to fifteen seconds." *Id.* at 229 n.2. Markonni did admit, however, that "I hadn't actually planned to enter the residence that soon . . . ." *Id.*

280. United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich. 1977), is a typical case from this period in Markonni's career. While on duty at the Detroit Metropolitan Airport, Markonni saw two women depart a flight from Los Angeles and join a man who was waiting for them. *Id.* at 1337. Markonni thought he recognized the man, Michael Lee, as a drug trafficker whom he had encountered in another case. *Id.* Lee wrote a name, address, and phone number on a piece of paper and handed it to a third woman who had joined the group. *Id.* The third woman, rather than the passengers, went to claim the baggage. *Id.* As Lee and the two other women then tried to leave the airport, agents accompanying Markonni stopped and questioned them. *Id.* When they responded evasively, the agents took them to a private office in the airport. *Id.* Markonni then brought the third woman and the suitcase she had claimed into the same office. *Id.* at 1338. The agents placed Lee and the three women under

also has suffered his share of set-backs.[281] Sometimes, Markonni's frustrations have resulted from his more inventive approaches to airport drug enforcement. In *United States v. Wright*,[282] for example, Markonni retrieved a suspect's suitcases from the airport baggage claim area and brought them to the suspect.[283] Markonni then arrested him in an attempt to justify a search of the suitcases as incident to the arrest.[284] The Sixth Circuit concluded that Markonni had gone too far; it declined to sanction this manipulation of the doctrine of search incident to arrest and held that the heroin Markonni had found should have been suppressed.[285]

More recently Markonni has relied on the suspect's purported voluntary cooperation to sidestep fourth amendment requirements. Because detaining suspects during initial questioning requires a showing of articulable suspicion, Markonni has tried to leave them free to walk away, at least in the eyes of the law.[286] Similarly, instead of forcing suspects to accompany him to an office at the airport for additional questioning, and thereby run the risk that a court will require probable cause yet find it absent (as happened earlier in his career), Markonni has encouraged his suspects to come along voluntarily.[287] Once

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arrest and then searched the suitcase, where they discoverd heroin. *Id.* The district court held that the initial stop was based on reasonable suspicion and that the evasive responses gave the agents probable cause to arrest. *Id.* Thus, the search of the suitcase was proper as incident to a valid arrest and the heroin was admissible. *Id.*

281. In several cases courts have suppressed evidence because Markonni detained or arrested on insufficient cause. *See, e.g.*, United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (no probable cause to arrest suspect who appeared nervous and matched DEA profile); United States v. McClain, 452 F. Supp. 195, 199-200 (E.D. Mich. 1977) (no probable cause to arrest suspect who appeared nervous and exhibited other innocent behavior); United States v. Coleman, 450 F. Supp. 433, 440-41 (E.D. Mich. 1978) (no probable cause to arrest suspect who was black and not carrying luggage); United States v. Miles, 425 F. Supp. 1256, 1259 (E.D. Mich. 1977) (no probable cause to arrest suspect based on anonymous tip and observation of suspect meeting description engaged in innocent behavior); United States v. Floyd, 418 F. Supp. 724, 728 (E.D. Mich. 1976) (no probable cause to arrest suspects who were nervous, trying not to appear together, and carrying little luggage); United States v. Van Lewis, 409 F. Supp. 535, 543 (E.D. Mich. 1976) (no probable cause to arrest suspect on sole basis of DEA profile), *aff'd on other grounds*, 556 F.2d 385 (6th Cir. 1977).

Figuring in several of these cases was the suspect's resemblance to the Drug Enforcement Administration's "drug courier profile," which is a list of characteristics, each of which is innocent in itself, but which, in combination, the DEA deems typical of airline passengers who are working as drug couriers. Markonni himself was instrumental in the profile's development. United States v. McClain, 425 F. Supp. at 199. The Sixth Circuit, in *United States v. McCaleb*, found that correspondence with some elements of the profile could not by itself justify a *Terry* stop. 552 F.2d 717, 720 (6th Cir. 1977). The Supreme Court reached a similar conclusion in Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam) (no probable cause for investigatory stop of suspect based on suspect's arrival time, behavior, and point of embarkation).

282. 577 F.2d 378 (6th Cir. 1978).

283. *Id.* at 379.

284. *Id.* at 379-80.

285. *Id.* at 382.

286. *See* United States v. Berry, 636 F.2d 1075, 1079 (5th Cir. 1981) (suspects "seized" when Markonni told them they had violated law); United States v. Berd, 634 F.2d 979, 984-85 (5th Cir. 1981) (no fourth amendment seizure when Markonni merely approached suspects and identified himself).

287. In United States v. Berry, 636 F.2d 1075 (5th Cir. 1981), Markonni asked a pair of suspected drug couriers if they "would accompany him to the DEA office for further questioning" after a noncoercive encounter in the airport heightened the agent's suspicions. *Id.* at 1077. The court held that a "seizure" within the meaning of the fourth amendment occurred "somewhere en route to the DEA office," *id.* at 1079; nevertheless, it proceeded to find that the seizure was reasonable. *Id.* at 1081.

Markonni recently has been forced to operate within the constraints of a Fifth Circuit decision in another one of his cases, which held that a forcible trip to a private office within the airport—there, a Delta Airlines office—is an arrest requiring probable cause, not a mere investigatory detention requiring only articulable suspicion. United States v. Hill, 626 F.2d 429, 433-37 (5th Cir. 1981).

there, he has sought consent to search their luggage rather than trust the sometimes unreliable bounds within which he might conduct a search incident to arrest.[288]

This strategy has not been fool-proof either. Some defendants have disputed Markonni's testimony that they voluntarily consented to his requests.[289] In two cases, for example, courts concluded that Markonni extracted consent through means that rendered it involuntary.[290] On the whole, however, Markonni's strategy of eliciting the voluntary cooperation of suspects has been successful.[291] Further, in a number of cases Markonni has relied on the inclination of suspects to renounce their interest in their baggage, and then searched the bags on the theory that they had been abandoned.[292]

If Williams had had the opportunity to question Markonni's good faith, she might well have drawn attention to these earlier cases. They demonstrate how Markonni has consistently pushed the fourth amendment to the limit and frequently beyond, and arguably suggest that he has not always acted under a good faith belief that his conduct was lawful.

Markonni's career, however, was not the only ground for challenging his good faith in arresting Williams for violating her bond conditions. A close examination of the undeveloped record discloses several tantalizing hints that

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288. *See, e.g.,* United States v. Berry, 636 F.2d 1075, 1077 (5th Cir. 1981) (court will not consider whether defendants' consent was in their own best interests when record indicates consent to search after legal seizure voluntary); United States v. Turner, 628 F.2d 461, 465-66 (5th Cir. 1980) (consent not invalidated by defendant's testimony that agent overbearing when informing defendant of right to refuse consent to search); United States v. Elmore, 595 F.2d 1036, 1038-42 (5th Cir. 1979) (evidence seized in search admissible when defendant voluntarily consented to search, when agents had reasonable basis to ask defendant to consent, and when search conducted in non-coercive manner); *cf.* United States v. Troutman, 590 F.2d 604, 605-06 (5th Cir. 1979) (voluntary consent to search eliminates taint of illegal initial stop of suspect).

289. *See, e.g.,* United States v. Berry, 636 F.2d 1075, 1077 n.1 (5th Cir. 1981) (defendant denied consenting to search); United States v. Turner, 628 F.2d 461, 465 (5th Cir. 1981) (same); United States v. Troutman, 590 F.2d 604, 605-06 (5th Cir. 1979) (same).

290 United States v. McCaleb, 552 F.2d 717, 721 (6th Cir. 1977) (involuntary consent suggested by unconstitutional stop and arrest and statement by agent that suspect would be detained if he did not consent to search); United States v. McLain, 452 F. Supp. 195, 201 (E.D. Mich. 1977) (citing *McCaleb* in invalidating search under similar circumstances).

291. The attractiveness of seeking assistance from suspects in their own apprehension as a law enforcement technique has no doubt increased in light of two recent Supreme Court decisions, United States v. Mendenhall, 446 U.S. 544 (1980), and Reid v. Georgia, 448 U.S. 438 (1980) (per curiam). In *Mendenhall*, Justice Stewart, writing on this point only for himself and Justice Rehnquist, endorsed a lenient standard for determining when a police-citizen contact is a seizure within the meaning of the fourth amendment, or when a trip to a police office is non-consensual. 446 U.S. at 553-56. In *Reid*, three additional justices expressed general approval of this standard. 448 U.S. at 442-43 (Powell, J., with Burger, C.J. & Blackmun, J., concurring).

In two of Markonni's cases, however, the Fifth Circuit has expressed a limited view of the precedential value of *Reid* and *Mendenhall* on these points. *See* United States v. Berry, 636 F.2d 1075, 1078-79 (5th Cir. 1981) (*Mendenhall* not applicable because only two justices agreed on when seizure of person occurs in police-citizen contact); United States v. Berd, 634 F.2d 979, 984 (5th Cir. 1981) (*Mendenhall* not applicable for reason stated in *Berry*, and *Reid* not applicable because Court did not consider whether agent's initial approach constituted seizure). Consequently, the Fifth Circuit has, in these cases, looked to the standards set in one of its own prior decisions—yet another Markonni case—to determine when a seizure had occurred. *See* United States v. Elmore, 595 F.2d 1036, 1042 (5th Cir. 1979) (police-citizen encounter not seizure when agents merely approached suspect and identified selves without using force or physical contact), *cert. denied*, 447 U.S. 910 (1980).

292. *See* United States v. Berd, 634 F.2d 979, 982-83 (5th Cir. 1981) (search upheld when suspect left briefcase on chair accompanying Markonni to office and later denied briefcase his); United States v. Canady, 615 F.2d 694, 695-96 (5th Cir. 1980) (search upheld when suspect repeatedly denied suitcase his).

Markonni arrested Williams for bond jumping as a mere pretext in order to search her for drugs. To begin with, Markonni's history of creative drug searches suggests that his principal interest was drugs. Further, when Markonni first saw Williams at the airport, he decided not to arrest her immediately, but instead to continue his surveillance.[293] If Markonni's true interest was only Williams' supposed bond jumping violation, he presumably would have arrested her as soon as he saw her. Furthermore, Markonni candidly revealed that drugs were on his mind when he arrested Williams.[294] Before searching her, he told her that he would release her if she had permission to leave Ohio "and if she had no drugs or narcotics on her person."[295] Although Markonni did check with the Ohio prosecutor to see whether Williams' travel restrictions were still in effect, he did not do so until after he had searched Williams and arrested her on drug charges.[296] If Markonni was not simply intent on conducting a search for drugs, and if he was at all solicitous of Williams' right not to be arrested and searched for a speculative offense, he could easily have called a prosecutor before the search while Williams waited. Thus, Markonni's discovery of drugs during his search of Williams was not mere fortuity, but rather seems to have been the intended and expected result of her arrest.

Although the trial record and Markonni's career and testimony at the suppression hearing may not demonstrate beyond all doubt that the agent acted either unreasonably or in bad faith, they do illustrate the kinds of evidence that bear on such determinations.[297] Moreover, insofar as these considerations

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293. *Id.* at 840.

294. Markonni saw Williams disembark from a non-stop flight from Los Angeles. He may have suspected that she was a "mule" for a drug operation, for he knew that Los Angeles was a drug supply center, 594 F.2d at 88, and that it was the source of Williams' drugs when he arrested her the year before. 622 F.2d at 846. Further, he had relied on similar information in the past to justify investigatory stops and arrests. *See, e.g.*, United States v. Hill, 626 F.2d 429, 430-31 (5th Cir. 1980) (suspect arrived from Los Angeles on trip of short duration and matched description of man known to be involved in drug trafficking); United States v. Elmore, 595 F.2d 1036, 1037 (5th Cir. 1979) (suspect arrived in Atlanta from Detroit, was on route to Birmingham, Alabama; Detroit and Birmingham two key cities on DEA distribution-use profile); United States v. Roundtree, 595 F.2d 672, 673 (5th Cir. 1979) (suspect arrived from Los Angeles and appeared to be concealing suspicious bulge on his calf); United States v. Williams, 594 F.2d 86, 88 (5th Cir. 1979) (suspect arrived from Los Angeles and was recognized by Markonni as person he had once arrested on drug charge); United States v. Troutman, 590 F.2d 604, 605 (5th Cir. 1979) (suspect arrived from Los Angeles and exhibited suspicious behavior); United States v. McCaleb, 552 F.2d 717, 719-20 (6th Cir. 1977) (suspect arrived from Los Angeles and conformed to DEA courier profile); United States v. Coleman, 450 F. Supp. 433, 435 (E.D. Mich. 1978) (suspect arrived from Los Angeles and did not carry any luggage); United States v. McClain, 452 F. Supp. 195, 196 (E.D. Mich. 1977) (suspect arrived from Los Angeles and only carried one small suitcase); United States v. Miles, 425 F. Supp. 1256, 1257 (E.D. Mich. 1977) (suspect arrived from Los Angeles and fit anonymous tipster's description); United States v. Allen, 421 F. Supp. 1372, 1373 (E.D. Mich. 1976) (suspect arrived in Detroit from Dallas on flight that might have connected with flight from Los Angeles and appeared nervous); United States v. Floyd, 418 F. Supp. 724, 726 (E.D. Mich. 1976) (suspect arrived from Los Angeles and did not claim any luggage); United States v. Van Lewis, 409 F. Supp. 535, 539-40 (E.D. Mich. 1976) (suspect traveled roundtrip between Detroit and Los Angeles in one day, had almost empty suitcase, and used alias in buying ticket).

295. Record at 27, United States v. Williams, Cr. 77-305A (N.D. Ga. 1977).

296. *Id.*

297. The good faith exception by its very nature will require courts to determine an officer's state of mind at the time of an arrest. Such findings in general are elusive and manipulable because they depend almost solely on the officer's own testimony and recollection. There will be a great temptation for an officer to shade or modify his testimony to portray good faith. This could result in the finding of good faith and the admitting of evidence, even in the extreme cases where an officer made an "honest" mistake for the deliberate purpose of obtaining sought-after evidence. Application of the exclusionary

suggest that Markonni acted unreasonably or in bad faith, they underscore the importance of examining the officer's misconduct, and highlight the Fifth Circuit's crucial error in *Williams*.

More generally, and ultimately more importantly, these cases also illustrate how successes and failures in defending against motions to suppress can shape the conduct of a conscientious law enforcement officer. Although Markonni has continued to operate right at, and frequently just over, the constitutional line, he seems quick to learn where that line is, and has adjusted his conduct accordingly. Thus, in the continuing saga of Agent Markonni's efforts to enforce the nation's narcotics laws within the changing confines of the fourth amendment, we have a remarkable demonstration of the exclusionary rule functioning as a specific deterrent.

C. THE COURT'S JUSTIFICATIONS FOR THE GOOD FAITH EXCEPTION

More important than the *Williams* court's shortcomings in applying its good faith exception to the facts before it, are the flaws in the court's justifications for adopting the exception itself. The claims which the court made for the exception—that it will not affect fourth amendment standards,[298] that it is consistent with the exclusionary rule's deterrence rationale,[299] and that it is supported by precedent[300]—are not only representative of those generally advanced by commentators who have advocated the exception, but are in large part drawn from their writings.[301] Thus, the *Williams* opinion provides a convenient focal point for analyzing the justifications underlying the good faith exception.

In laying the foundation for its good faith approach, the *Williams* court discussed the exclusionary rule in terms of costs and benefits. The court began by emphasizing that the exclusionary rule is "not itself a requirement of the Constitution," but rather a "judge-made rule," the only justification for which "is deterrence of future police misconduct."[302] On the cost side, the court argued that the rule must be considered "in light of its direct effect of preventing the 'whole truth' from being told and its byproducts of freeing guilty criminals and endangering society."[303] The court concluded that the rule should not apply "in those contexts where it does not effectively deter official misconduct."[304]

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rule despite a finding of good faith, at least in those cases where an officer had an ulterior motive for his "good faith" arrest, would protect against sham claims of "honest" mistakes.

There is another reason to be concerned about how carefully courts will scrutinize claims of good faith. In Scott v. United States, 436 U.S. 128 (1978) the Supreme Court said that, in evaluating officers' conduct, courts should use "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Id.* at 138. Although *Scott* involved wiretaps rather than traditional searches and seizures, its incorporation into the good faith exception would either eliminate analysis of the validity of officers' assertions of good faith or render such analysis perfunctory at best. Thus, the combination of *Scott* and *Williams* might result in an exception based solely on the objective question of general "reasonableness."

298. 622 F.2d at 847.

299. *Id.* at 842.

300. *Id.* at 843-45.

301. *See* notes 442-45 *infra* and accompanying text (discussing *Williams* court's reliance on secondary authority).

302. *Id.* at 841-42.

303. *Id.* at 842.

304. *Id.* at 841-42.

As an example of such a context, it cited "improper police actions taken in reasonable good faith" because "it makes no sense to speak of deterring police officers who acted in the good faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless somehow we wish to deter them from acting at all."[305]

Although perhaps appealing in their simplicity, these justifications for the good faith exception are flawed. First, the court expressly denied that the good faith exception will diminish fourth amendment protections: "[I]t will be argued that today's decision undercuts the fourth amendment. Not so; it concerns only the exclusionary rule . . . ."[306] But the very breadth of the court's definition of good faith violation guarantees that many fourth amendment infringements will not even be examined by the courts. Second, the court claimed that the exception is justified because when a police officer acts in good faith the deterrent effect of the exclusionary rule is unnecessary.[307] This argument also must fail because it is based on the invalid premise that the exclusionary rule acts only as a simple deterrent; it ignores the wider effects of both general and systemic deterrence. Third, the court argued that the good faith exception is justified by legal precedent.[308] This contention, however, is based on misinterpretation and distortion of the relevant Supreme Court cases.

1. The Impact on the Fourth Amendment

The *Williams* court's good faith exception to the exclusionary rule has two facets: "technical violations"[309] and "factual mistakes."[310] The court borrowed its definitions from a law review article written by Professor Edna Ball.[311] As the article and the court describe the two branches, they roughly correspond to what are known in the criminal law as mistakes of law and mistakes of fact:

> In fourth amendment cases, most good faith violations concern the failure to meet the requirement of probable cause. Two basic types of violation are possible. First, an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause. Such cases may be characterized as examples of "good faith mistake." Second, an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled. In each of these cases, the officer may be deemed to have committed a "technical violation."[312]

This sweeping characterization of good faith violations suggests that the good faith exception may not only cripple the exclusionary rule, but also drastically limit the protections of the fourth amendment. Because only egregious, inten-

305. *Id.* at 842 (emphasis in original).
306. *Id.* at 847.
307. *Id.* at 842.
308. *Id.* at 843-45.
309. *Id.* at 843.
310. *Id.* at 844.
311. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978).
312. *Id.* at 635-36, *cited in* United States v. Williams, 622 F.2d at 840-41.

tional, and flagrantly illegal police misconduct would fall outside these two branches, the good faith exception will effectively insulate important areas of police misconduct from judicial oversight and control.

The Technical Violation Branch. In its discussion of the "technical violation facet" of the exception, the court averred that "the most common forms of technical violations made in good faith are arrests made in good faith reliance on a statute later declared unconstitutional or, as here, on a reasonable interpretation of a statute that is later construed differently."[313] This assertion is misleading on several counts. To begin with, cases involving a substantive criminal statute subsequently declared unconstitutional or construed differently are, in practice, very rare. Indeed, even *Williams* was not such a case.[314] Markonni's arrest did not involve a good faith, reasonable interpretation of a statute later construed differently.[315] Had *Williams* involved an arrest pursuant to a substantive criminal statute later invalidated or construed differently, the court could have upheld Markonni's conduct without the exception.

This result could have been reached because such cases, correctly understood, do not even raise fourth amendment issues. As long as a reasonably prudent person would be justified in believing that a suspect had committed, or was committing, an offense, an arrest in a public place for that offense is supported by probable cause and satisfies constitutional standards.[316] A search incident to that arrest is similarly valid.[317] The police conduct is lawful because the officer had probable cause at the time of the arrest, not because he acted in good faith. Probable cause at the time of arrest does not dissipate because a substantive criminal statute is later construed differently or held unconstitutional.[318] The same analysis applies to other fourth amendment stan-

313. 622 F.2d at 843.

314. *See* notes 263-66 *supra* and accompanying test (discussion of Markonni's misconduct).

315. *Id*

316. *See* United States v. Watson, 423 U.S. 411, 414-15, 423-24 (1976) (postal officer's warrantless arrest of suspect in public place did not violate fourth amendment because based on probable cause; officer acted pursuant to constitutional statute authorizing warrantless arrest for felonies when reasonable grounds to believe offense is being or has been committed); Draper v. United States, 358 U.S. 307, 313-14 (1959) (warrantless arrest lawful if officer has probable cause; probable cause exists when facts within officer's knowledge sufficient to justify belief by reasonably cautious man that offense is being or has been committed); Carroll v. United States, 267 U.S. 132, 149 (1924) (warrantless search and seizure supported by probable cause does not violate fourth amendment).

317. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (custodial arrest based on probable cause is reasonable intrusion under fourth amendment; officer may search suspect incident to arrest without additional justification); Chimel v. California, 395 U.S. 752, 763 (1969) (incident to lawful arrest, officer may search arrestee's person and area within his immediate control to remove weapons and seize evidence).

318. *See* Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979) (officer's arrest of suspect pursuant to presumptively valid city ordinance lawful because action was supported by probable cause; later declaration that ordinance unconstitutional does not affect lawfulness of arrest); Michigan v. Carpenter, 69 Mich. App. 81, 83, 244 N.W.2d 338, 339-40 (1976) (officer's search of automobile pursuant to dangerous weapon statute after observing rifle case in plain view supported by probable cause; subsequent determination that rifle is not dangerous weapon within meaning of statute does not affect lawfulness of search). *But see* Powell v. Stone, 507 F.2d 93, 98 (9th Cir. 1974) (evidence obtained from search incident to arrest under ordinance later declared unconstitutional held not admissible in murder trial), *rev'd on other grounds*, 428 U.S. 465 (1976); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1174 (2d Cir. 1974) (arrest pursuant to unconstitutional statute is unlawful, evidence obtained during search incident to arrest inadmissible at trial); Hall v. United States, 459 F.2d 831, 840 (D.C. Cir. 1972) (en

dards such as reasonable, articulable suspicion to stop and frisk.[319] Moreover, in such cases the exclusionary rule is unnecessary to test the constitutionality or reach of the criminal statute. A defendant arrested and charged with violating such a statute can directly challenge its constitutionality,[320] or argue that it should be construed in a particular way.

The "most common forms" of technical violations shielded by the good faith exception, however, do involve fourth amendment violations. Such violations include arrests and searches made without probable cause or a warrant, and stops and frisks made without reasonable suspicion, either in reliance on prior court decisions[321] that arguably permit them or pursuant to statutes that explicitly authorize them.[322] Unlike defendants who are arrested for violating criminal statutes of a substantive nature, and who can argue during their case-in-chief that the laws should be invalidated or construed differently, victims of coercive police action carried out pursuant to either a criminal statute or a prior court decision of a procedural nature, have no recourse to challenge the police officer's authority except through a suppression motion. This is because a substantive criminal statute carries its own penalty apart from that which is imposed for crimes uncovered in a search incident to the arrest. Thus, the victim of an arrest under an unconstitutional criminal statute of a substantive character has the opportunity and incentive to vindicate his rights at the trial for that offense. A criminal statute or prior judicial decision of a procedural

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banc) (evidence obtained during search incident to arrest under unconstitutional statute inadmissible at trial).

319. *See* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (per curiam) (officer's stop and frisk is lawful if facts available at moment of conduct justify belief in man of reasonable caution that action taken was appropriate); Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (officer's stop and frisk of suspect does not violate fourth amendment if supported by specific and articulable facts; such intrusion is reasonable if facts available to officer at time of action sufficient to warrant belief by reasonable man that action taken was appropriate).

320. *See* Grayned v. City of Rockford, 408 U.S. 104, 107 (1972) (defendant arrested and convicted pursuant to anti-picketing ordinance; ordinance held unconstitutional and conviction reversed); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (defendant arrested and convicted pursuant to vagrancy ordinance; ordinance held unconstitutional and conviction reversed).

321. By prior court decisions we refer to decisions establishing the ingredients of probable cause in a particular context, such as Aguilar v. Texas, 378 U.S. 108, 114 (1964) (information from informants), decisions delineating the nature and scope of the exceptions to the warrant requirement, such as United States v. Rabinowitz, 339 U.S. 56, 63-65 (1950) (fixing scope of warrantless search incident to valid arrest), *overruled*, Chimel v. California, 395 U.S. 752 (1969), and decisions defining the scope of the fourth amendment itself, such as Olmstead v. United States, 277 U.S. 438, 466 (1928) (search requires physical trespass), *overruled*, Katz v. United States, 389 U.S. 347 (1967).

322. A criminal statute or decision of a procedural character does not describe conduct that is a crime, but rather empowers police in certain instances to obtain warrants, conduct searches, or make arrests. Because the fourth amendment requires that an officer have probable cause before carrying out such actions, and, sometimes, that he secure a warrant as well, a statute or court decision authorizing them on less than probable cause or without a warrant when one is required violates the Constitution. *See* Ybarra v. Illinois, 444 U.S. 85, 90-91 (1979) (officer's search of defendant pursuant to state statute unlawful because not supported by probable cause; officer had no reason to believe defendant committing or had committed offense); *cf.* Payton v. New York, 445 U.S. 573, 588-89 (1980) (officer's warrantless and nonconsensual entry into private residence to arrest defendant pursuant to state statute is unconstitutional; statutory authority for warrantless entry does not affect determination). Although a legislature is free within the bounds of the Constitution to define the elements of a substantive criminal offense, and a court has the power to construe such a statute, neither a legislature nor a court may alter the requirements of the fourth amendment itself. Thus, an officer who violates the fourth amendment in reliance on a statute or decision that purportedly authorizes such conduct may not justify his constitutional infraction on the basis of his good faith or the reasonableness of his actions.

character, however, carries no penalty of its own. As a result, a victim of police action undertaken pursuant to such a statute or decision has neither the incentive nor the opportunity to challenge its constitutionality except through a motion to suppress the evidence obtained. A good faith exception that excuses unconstitutional conduct taken in reliance on such statutes and decisions removes that incentive and opportunity, and thereby ensures that police misconduct will occur and recur free from judicial correction.

Similarly, when evidence is uncovered in the course of an arrest or search made pursuant to a warrant, the validity of the warrant itself can be challenged only through a motion to suppress. Yet it seems clear that a search or arrest made in reliance on an invalid warrant also will be excused under the technical violations facet of the good faith exception.

While the *Williams* court demonstrated uncharacteristic self restraint by writing in a footnote that because "no warrant is involved here . . . nothing we say applies to factual situations where one has been obtained,"[323] the court's reasoning surely compels the conclusion that when a police officer acts in good faith reliance on a warrant, the fruits of his search should be beyond the reach of the exclusionary rule. Indeed, two of the decisions on which the court relied involve "good faith" searches pursuant to arguably defective warrants.[324] And, in its very definition of a "technical violation" the court included reliance "on a warrant that is later invalidated."[325] Thus, the technical violations branch of the court's exception is far wider than the court acknowledged, for it exempts from the reach of the exclusionary rule the fruits of any unconstitutional police conduct undertaken in good faith reliance on court decisions, statutes, and warrants.

Although the *Williams* court insisted that the good faith exception limits only the exclusionary rule and not the fourth amendment, it was plainly wrong. By defining "technical violations" to include good faith reliance on court decisions, statutes of a procedural nature, and warrants, the court insulated many fourth amendment violations from the deterrent effect of the exclusionary rule. The court justified this result on the ground that the exclusionary rule can have no deterrent effect when a police officer relies in good faith on a statute or prior court decision. This, too, is plainly wrong. By identifying the fourth amendment infirmities in the statute or decision on which the officer has relied, future fourth amendment violations will be prevented. The good faith exception ensures that this process of identification will be delayed or will not occur at all.[326]

The Good Faith Mistake Branch. The court's treatment of the "good faith mistake" branch also demonstrates that the good faith exception affects the fourth amendment as well as the exclusionary rule. The court suggested

323. 622 F.2d at 840 n.1.

324. *Id.* at 844-46 (citing United States v. Janis, 428 U.S. 433, 434 (1976); and United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975)). Although the court discusses these cases in the "mistake of fact" portion of its opinion, the court's point seems to be that reliance on a warrant establishes, or at least goes a long way toward establishing, reasonable good faith.

325. 622 F.2d at 841 (quoting Ball, *supra* note 311, at 638-39).

326. Exactly why the good faith exception will have this result is developed in greater detail in text at notes 349-55 *infra*.

that Agent Markonni made a reasonable good faith mistake in believing that Williams' violation of her bond condition authorized him to arrest her.[327] In addition to the court's error in failing to examine both the record and Markonni's background in addressing the good faith question,[328] this characterization indicates several flaws in the "good faith mistake" branch of the exception as the *Williams* court conceived and applied it.

The court's reasoning here is extremely confusing. To begin with, its characterization of Markonni's good faith mistake, which it describes at one point as "an action under a reasonable factual error about one element of the crime defined in section 3146,"[329] sounds like a mistake of law, rather than a mistake of fact. Indeed, it sounds suspiciously like the very mistake, "an action under a reasonable interpretation of the arrest power under section 3146 that was subsequently reconstrued by our panel," which the court described as an example of a good faith "technical violation."[330] Because section 3146 does not define a crime or have anything to do with arrest powers, it is unlikely to be a technical violation even under that broad rubric.[331] Thus, the court's meaning is unclear.

Not only did the court never specifically identify Markonni's putative mistakes, it failed to distinguish between the two branches of the exception. Nevertheless, the court reached out to fashion the broadest possible good faith exception by describing the case as presenting questions of both a good faith factual mistake and a technical violation.[332] In fact, however, the case presented neither.

Far more disturbing than the court's failure to identify Markonni's putative good faith mistake of fact, is its creation of an exception to the exclusionary rule for such mistakes. By insulating from the exclusionary rule all police conduct resulting from good faith mistakes of fact, the good faith exception will erode such key fourth amendment standards as "probable cause," "articulable suspicion," and "exigent circumstances," and will inevitably encourage a movement away from these traditional standards toward a test of general reasonableness in all fourth amendment situations.

A good faith mistake branch to the exception suggests that existing fourth amendment law fails to accommodate mistakes of fact. As discussed previously, however, the law does allow for police error in several ways.[333] For example, under current law, police action is judged from the standpoint of what the officer reasonably believed to be the facts at the time he acted.[334]

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327. 622 F.2d at 844.

328. *See* notes 268-97 *supra* and accompanying text (discussing reasonableness and good faith of Markonni's conduct).

329. 622 F.2d at 846.

330. *Id.*

331. *See* note 229 *supra* (text of statute).

332. 622 F.2d at 846.

333. *See* notes 316-19 *supra* and accompanying text. We already have made this point in our discussion of the technical violation branch. This repetition is unavoidable, however, given the need to follow the structure of the court's opinion. That the same criticism applies to both branches of the court's exception is merely another indication of the invalidity of the *Williams* court's distinction between good faith mistakes and technical violations.

334. *See* notes 316-19 *supra* and accompanying text (discussing judicial standard for analyzing police conduct; citing cases).

Thus, an arrest and incident search will be upheld if the police officer reasonably believed, on the basis of the facts as they appeared to him at the time, that he had probable cause to arrest and search, even though he discovers later that the suspect committed no offense.[335] Moreover, a stop will be sustained if grounded on reasonable, articulable suspicion, even though it turns out that there was nothing to be suspicious about,[336] and a warrantless entry of a house will be upheld if the police reasonably believed that exigent circumstances existed, even if upon entry they find that the suspect was not about to flee.[337]

Existing law also takes account of the legitimate interests of law enforcement officers in other ways. For example, the law recognizes that a policeman may be required to act quickly and, when so acting, should be given the benefit of the doubt as to the reasonableness of his actions.[338] An experienced officer may draw deductions from evidence that appears insignificant to a layman,[339] and an officer may rely on rumors, hearsay, the prior record of the suspect, and other evidence inadmissible at trial to support his determination of probable cause.[340] In addition, police action short of an arrest or full-blown search is permissible even when probable cause is lacking.[341] Finally, when the police act pursuant to a warrant, courts show greater deference to their factual judgments.[342]

Because the fourth amendment already accommodates an officer's factual mistakes,[343] the Fifth Circuit can only have meant one of two things if it intended to exempt from the exclusionary rule evidence that would be otherwise

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335. *See* note 316 *supra* (citing cases).

336. *See* note 319 *supra* (citing cases).

337. *See* Warden v. Hayden, 387 U.S. 294, 298 (1967) (officers' warrantless entry into house and search for suspect does not violate fourth amendment; exigencies of situation justified action). The Court has also held that exigent circumstances exist when the police have a reasonable belief that the evidence would be destroyed during the time it would take to get a warrant, and has permitted the police to search without a warrant in such circumstances. *See* note 130 *supra* (citing cases).

338. *See* Warden v. Hayden, 387 U.S. at 298-99 (police acted reasonably when they entered house in pursuit of armed robber; speed essential in such situation).

339. *See* United States v. Cortez, 449 U.S. 411, 418-19 (1981) (investigative stop of defendants does not violate fourth amendment; officers may gain legitimate basis for suspicion by utilizing objective facts which seem meaningless to untrained individual).

340. *See* Draper v. United States, 358 U.S. 307, 311 (1959) (officer may consider hearsay when determining probable cause); Brinegar v. United States, 338 U.S. 160, 172-73 (1949) (officer may consider prior police record of suspect when determining probable cause).

341. *See* note 118 *supra* (citing *Terry*).

342. *See* United States v. Ventresca, 380 U.S. 102, 106-07 (1965) (police action taken under warrant accorded preference; in marginal case, search under warrant may be sustainable when search without warrant would be held invalid).

343. One area where it is not clear that existing fourth amendment law accommodates reasonable, factual mistakes by the police is that of consent searches. In United States v. Matlock, 415 U.S. 164 (1964), the Supreme Court expressly left open the question whether a warrantless search was valid when the searching officers reasonably, but erroneously, believed that the consenting party had sufficient authority over the premises to authorize the search. *Id.* at 177 n.14. This issue is not an easy one. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 58-64 (1974) (discussing complexities of consent to search dwelling by resident when search is directed against other resident). It should be resolved, however, by deciding if such a search is reasonable under the fourth amendment—whether the police should be required to seek a warrant "just to make sure"—not whether the evidence should be admitted under a good faith factual mistake exception to the exclusionary rule. It seems a pretty safe bet that the Court will eventually uphold such searches, as have other courts that have addressed the issue. *See* People v. Adams, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981) (evidence obtained in search based on good faith reliance on person's consent not suppressible upon discovery that person giving consent did not live on premises searched).

admissible. It must have intended either that a test of general reasonableness should replace the specific benchmarks of probable cause, reasonable suspicion, and exigent circumstances, or, at the very least, that evidence obtained in a search incident to an arrest should be admissible as long as the officer reasonably believed he had probable cause for the arrest, even though he did not. Even this more limited reading of the *Williams* court's good faith exception translates into a fundamental change in fourth amendment standards.[344]

This result, although not explicit in *Williams*, seems to follow ineluctably from the opinion. If the court did not intend to introduce, at least to some extent, a concept of general reasonableness into fourth amendment law, its development and application of a good faith mistake branch makes little sense. Other evidence within the opinion itself also suggests that the *Williams* court believed Markonni's actions should be judged under a test of general reasonableness. In summarizing the agent's conduct, the court referred to the fact that Markonni knew Williams "was arriving from the very city from which she had obtained the heroin that caused her first conviction."[345] This fact may be relevant to Markonni's suspicion that Williams was engaged in drug trafficking, and may well have been an important factor in Markonni's decision to make the arrest,[346] but it is obviously irrelevant to Markonni's authority to arrest Williams for violating her travel restrictions. Thus, unless the court sought to evaluate Markonni's actions under a test of general reasonableness, this observation is irrelevant.

Although the court claimed that a good faith exception does not diminish the protections of the fourth amendment, other evidence suggests that it knew better. As the author of the article upon which the court relied for its definition of the exception candidly admitted in a portion of her article that the court understandably did not quote:

> The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against government intrusion. To the extent that probable cause is the key to fourth amendment protections, the good faith exception diminishes the liberality of the fourth amendment . . . . In other words what is required is no longer "probable cause" as presently defined, but instead a "reasonable ground for belief."[347]

Thus, both branches of the court's exception drastically affect fourth amendment law. A good faith exception for technical violations will stifle litigation that otherwise would identify such violations.[348] An exception for good faith

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344. It marks a shift from requiring probable cause to sustain an arrest to requiring probable cause *or something close to it*.

345. 622 F.2d at 846.

346. *See* text accompanying notes 293-96 *supra* (discussing possibility that bail jumping grounds for arrest merely a pretext to search for drugs).

347. Ball, *supra* note 311, at 655-56.

348. It will also stifle litigation with respect to the reach of the fourth amendment itself. Just as reliance on a prior decision regarding probable cause or the warrant requirement will excuse the officer, so would reliance on a decision defining what constitutes a search or seizure. This would be a most unfortunate result. *See* note 178 *supra*.

mistakes will erode the substantive standards of the fourth amendment, not merely affect the application of the exclusionary rule.

2. The Deterrence Justification

The *Williams* court's second justification for adopting the good faith exception was that the exclusionary rule should not be applied when an officer makes a good faith reasonable mistake of either fact or law. The court reasoned that, whatever the source of the officer's error, he acted in what he thought at the time was a legal manner.[349] The court argued, moreover, that applying the exclusionary rule in such a situation would " 'have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal.' "[350] Thus, any deterrent effect imposed by excluding the fruits of that error would be minimal and undesirable.

By adhering to this limited understanding of deterrence, the *Williams* court created a broad good faith exception to the exclusionary rule that shields all "reasonable" law enforcement mistakes under one of its two branches. The exclusionary rule, however, is not primarily a punitive device: it is a regulatory mechanism aimed at deterring police misconduct. Nevertheless, the *Williams* court adopted a retrospective view, and concluded that the exclusionary rule has no deterrent effect on good faith actions because an officer who acted in good faith cannot be deterred from that action by subsequently excluding its fruits.[351] The proper inquiry, however, is not whether the subsequent application of the exclusionary rule will deter a police officer who has acted in the good faith belief that he was right, but rather whether applying the exclusionary rule will reduce the number of fourth amendment violations in the future at an acceptable cost.

Because a police officer cannot be deterred from violating the Constitution unless he knows that his actions are in fact unconstitutional, future fourth amendment violations can only be deterred if courts examine police misconduct without regard to its good faith or consistency with existing standards. Although the *Williams* court indulged in the assumption that Markonni's conduct violated the fourth amendment,[352] it disposed of the case without deciding what precise violation he had committed. Indeed, the court's good faith exception practically guarantees that the violation never will be identified. Thus, as long as the limits of a DEA agent's authority to arrest for violations of bail conditions remain uncertain, law enforcement officers such as Markonni are left in welcome ignorance, free to make such "reasonable" mistakes in "good faith" forever. But if such arrests are unconstitutional, the good faith exception has failed to deter future fourth amendment violations by simply failing to identify the mistake itself.[353]

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349. 622 F.2d at 846.

350. *Id.* at 842 (quoting 594 F.2d at 97-98 (Clark, J., dissenting)).

351. *Id.*

352. *Id.* at 840.

353. A recent decision of the Kentucky Court of Appeals illustrates this crucial failing of the good faith exception. In Richmond v. Commonwealth, No. 80-CA-1366-MR (Ky. July 31, 1981) (copy on file at *Georgetown Law Journal*), the defendant challenged a district judge's authority to issue a search

The application of the exclusionary rule, in contrast, would achieve this deterrence because under the rule the constitutionality of the police action, rather than its good faith or reasonableness, is dispositive of the suppression issue. Moreover, the cost of this deterrence is small. In the rare cases where an honest and conscientious police officer could not have known that a court would subsequently determine that his actions violated the fourth amendment, the decision would not apply retroactively.[354] Consequently, the exclusionary rule will require the suppression of evidence only in the case that announces an unforeseeable rule of law.

The good faith exception to the exclusionary rule, therefore, is not consistent with the *Williams* court's deterrence justification for the approach. The court's claim that the exception will admit evidence only "when no deterrence is called for and none can in fact be had"[355] is unconvincing; it forgets that even when the exclusionary rule fails to have a simple deterrent effect on a police officer's good faith conduct, it nevertheless identifies new constitutional violations and, as the earlier discussion of *Delaware v. Prouse* demonstrated, instructs all officers that this conduct is contrary to the fourth amendment and will not be condoned.

3. The Support of Precedent

The second *Williams* majority endeavored to justify its good faith exception not only as consistent with both the fourth amendment and the deterrence purpose of the exclusionary rule, but also as the natural outgrowth of precedent and scholarly authority.[356] Yet its use of authority is utterly unconvincing. The *Williams* good faith exception is, to begin with, inconsistent with a number of recent Supreme Court decisions.[357] Moreover, because the *Williams* approach determines admissibility without ruling on new constitutional standards and because it denies the litigant the potential benefit of a successful

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warrant outside the territorial limits of his district. He argued that the warrant was invalid because the judge could not act outside of his district, and that all evidence discovered during a search conducted pursuant to the warrant should be suppressed. *Id.*, slip op. at 3. The court conceded that "[w]e doubt the authority of a district judge, while outside the territorial limits of his district, to issue a warrant for the search of premises outside his district." *Id.* at 4. Nevertheless, the court ruled that despite the questionable validity of the warrant, the evidence was admissible at trial because the officers who conducted the search had "acted reasonably and in good faith." *Id.* at 9.

More importantly, the court was ready to assume a constitutional violation, yet refused to determine the constitutionality of the officers' conduct, reasoning that "[w]e find it unnecessary to decide that particular issue . . . because we believe the fruits of the search should not have been suppressed even though the magistrate may not have had authority to issue it." *Id.* at 4. Thus, like Agent Markonni, these officers remain in happy ignorance as to the legality of their conduct, and are free to repeat their actions in the "good faith" belief that they are within the limits of the Constitution.

In this case, the good faith exception will fail to deter future fourth amendment violations because the court failed to identify the officers' mistake. In addition, by refusing to resolve the underlying constitutional issue, the court left the standards of the warrant requirement in doubt. Thus, *Richmond* illustrates how the good faith exception will retard the development of fourth amendment law, and encourage a general reasonableness standard for examining police misconduct.

354. *See* note 432 *infra* (discussing retroactivity).

355. 622 F.2d at 847.

356. *See id.* at 840-41 (both reason and authority support good faith exception and demand explicit recognition of implicitly supported exception).

357. *See* notes 422-39 *infra* and accompanying text (discussing recent Supreme Court cases in which evidence excluded although officers' beliefs seem reasonably justified by good faith compliance with statutes not yet invalidated).

fourth amendment challenge, it departs drastically from traditional principles upon which the Supreme Court decides fourth amendment cases.[358]

The *Williams* court conceived of its good faith exception as having two facets: technical violations and factual mistakes. It divided its discussion of authority accordingly. Although the court seems to have assigned precedent randomly to each facet, this discussion nevertheless follows the *Williams* format.

Technical Violations Facet. The *Williams* court relied principally upon *Michigan v. DeFillippo*[359] to support this branch of its good faith exception to the exclusionary rule.[360] Although the court suggested that the facts of the two cases are "closely analogous,"[361] there is little similarity between them. The Supreme Court in *DeFillippo* analyzed only the concept of probable cause; it did not consider the reach of the exclusionary rule as an independent issue. Thus, *DeFillippo* and *Williams* are entirely different cases and whatever support the *Williams* court purported to find in the prior decision of the Supreme Court was illusory.

In *DeFillippo*, Detroit police officers saw a man and a woman in an alley where the officers had gone to investigate the reported presence of two drunks.[362] As the officers approached, the woman was in the process of lowering her slacks.[363] Not surprisingly, one of the officers asked what the two were doing, and the woman responded that she was about to relieve herself.[364] The officers asked the man to identify himself, and DeFillippo gave obviously false, contradictory, and evasive answers.[365] The officers then arrested him for violating a Detroit ordinance that made it a misdemeanor for a person so stopped to refuse to properly identify himself.[366] A search incident to this arrest uncovered drugs in DeFillippo's pockets.[367] An intermediate Michigan appellate court held the ordinance unconstitutionally vague and ordered the evidence suppressed.[368]

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358. *See* notes 394 & 432 *infra* and accompanying text (traditionally litigant entitled to suppression in case determining new standards, but *Williams* neither gives litigant benefit nor requires court to articulate standards).

359. 443 U.S. 31 (1979).

360. 622 F.2d at 843.

361. Arguably the court was correct in this reading of the facts of the cases. *Compare* Michigan v. DeFillippo, 433 U.S. at 40 (search yielding drugs merely incident to arrest for obvious violation of ordinance) *with* United States v. Williams, 622 F.2d at 840 (search yielding drugs merely incident to arrest for obvious violation of court order).

362. 443 U.S. at 33.

363. *Id.*

364. *Id.* The Court concluded that this behavior, occurring at 10 p.m., warranted further police investigation. *Id.* at 37.

365. *Id.* at 33.

366. *Id.* at 34 (*citing* DETROIT, MICH., CODE § 39-1-52.3 (1976)).

367. *Id.* at 33.

368. People v. DeFillippo, 80 Mich. App. 197, 203, 262 N.W.2d 921, 924 (1977), *rev'd*, 443 U.S. 31 (1979). The appellate court expressly rejected the argument that good faith reliance on a presumptively valid ordinance renders the arrest legal. *Id.* at 200, 262 N.W.2d at 923. The Michigan Supreme Court denied further review. 443 U.S. at 35.

The *Williams* court's misreading of *DeFillippo*, a case involving the substantive scope of the fourth amendment, as a case involving only the application of the exclusionary rule, suggests an essential connection between the rule and the underlying right. *See* text accompanying notes 527-37 *infra* (char-

The United States Supreme Court granted *certiorari* because of contrary Fifth Circuit holdings that an arrest under analogous circumstances did not violate the fourth amendment.[369] Because the officers had ample cause to conclude that DeFillippo had violated the ordinance, the only issue before the Court was whether the officers lacked probable cause within the meaning of the fourth amendment simply because the ordinance was later declared unconstitutional.[370] The Court held the arrest valid because probable cause depends on the facts and circumstances at the time of the arrest and does not dissolve upon the subsequent judicial declaration that an ordinance is unconstitutionally vague.[371] Therefore, the Court held that the evidence obtained incident to the arrest was admissible.[372]

Thus, *DeFillippo* declared no new exclusionary rule theory. Rather, it adhered to the traditional view that probable cause turns on whether the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[373] In short, the *DeFillippo* Court withheld application of the fourth amendment exclusionary rule because it found that no fourth amendment violation had occurred.[374] It is a long step, however, from *DeFillippo* to the Fifth Circuit's position in *Williams* that whether or not a fourth amendment violation has occurred, the exclusionary sanction should not apply when the violation is a "good faith reasonable" one.[375] *DeFillippo* involved only rights; *Williams* purports to involve only remedies. Thus, contrary to the argument in *Williams*, *DeFillippo* did not imply a good faith exception to the exclusionary rule; it held, rather, that evidence need not be suppressed when no fourth amendment violation occurs.

The *DeFillippo* decision simply makes the point that an arrest that in some sense violates another constitutional provision—because the underlying criminal statute is invalid—does not, for that reason alone, also violate the fourth amendment. *DeFillippo* holds that the probable cause standard does not incorporate other constitutional protections. Thus, a successful constitutional challenge to an ordinance on grounds of vagueness does not automatically render an arrest under the ordinance a fourth amendment violation.[376] This point perhaps can be clarified with a hypothetical variation on *DeFillippo*.

Suppose an airport law enforcement officer saw DeFillippo distributing leaf-

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acterizing recent arguments of Chief Justice Burger and Judge Wilkey against exclusionary rule as attacks on the fourth amendment itself).

369. *Id.* at 35. The Court identified United States v. Carden, 529 F.2d 443 (5th Cir. 1976), and United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971), as Fifth Circuit cases holding that the fourth amendment does not require the suppression of evidence that is obtained incident to an arrest made pursuant to a presumptively valid ordinance. 443 U.S. at 35.

370. *Id.* at 37.

371. *Id.* The Court noted a possible exception when the ordinance is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38.

372. *Id.* at 36.

373. *Id.* at 37.

374. *Id.* at 40.

375. *See* 622 F.2d at 840 (exclusionary rule exception applies when evidence discovered in actions "taken in good faith and in the reasonable, though mistaken, belief that they are authorized").

376. *See* 443 U.S. at 40 (unconstitutionally vague ordinance violates due process but does not undermine validity of arrest for violating ordinance).

lets that described the sublime tranquility that could be attained by joining a local religious cult. The officer arrested DeFillippo and charged him with violating a recently enacted ordinance that purported to protect the susceptible from the influence of such cults. The ordinance made it an offense to distribute any leaflets of this sort without advance approval of the Port Authority. The officer knew this leaflet had not been approved. In searching DeFillippo incident to the arrest, the officer discovered drugs.

In this hypothetical problem, should the court suppress the drugs on the ground that the ordinance violated DeFillippo's first amendment rights? Few would argue that the fourth amendment exclusionary rule should be pressed into service here, unless perhaps the officer knew that the ordinance would never pass constitutional muster[377] or that its enforcement was a mere pretext for a search.[378]

In our society, arresting DeFillippo for handing out pamphlets would be unlawful in one sense because he had broken no valid law. It is difficult to see, however, why that arrest, which was based on probable cause, or the search incident to it, would violate the fourth amendment.[379] Whatever values would be served by suppressing evidence in such a case would be largely distinct from those protected by the fourth amendment. Because other avenues for testing the ordinance's constitutional validity are readily available,[380] suppression of the evidence would be unnecessary. This is why not all arrests made pursuant to invalid laws violate the fourth amendment.

Had the *Williams* court been less eager to issue its sweeping mandate and more willing to decide the case before it, it could have relied on *DeFillippo* to conclude that the exclusionary rule should not apply; thus the court need not have based its decision on the novel theory that it rushed to cobble up, but instead could have admitted the evidence on the ground that Markonni's arrest, even if in some sense illegal, did not violate the fourth amendment. The court's rationale could have been that although the statutes did not authorize Markonni's warrantless arrest of Williams, the arrest nevertheless did not violate the fourth amendment because it was made in a public place on probable cause.[381] The plausibility of such a result depends on precisely what mistake the court assumes Markonni made. On the assumption that Markonni's only

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377. *See* note 371 *supra* (*DeFillippo* court noted that some statutes might be so flagrantly unconstitutional that any reasonably prudent person would recognize their unconstitutionality).

378. *See* Michigan v. DeFillippo, 443 U.S. at 40-41 (Blackmun, J., concurring) (if defendant could show that police use ordinance as pretext for investigatory searches and arrests, it would rebut any claim of good faith reliance by officers).

379. The distinction between the arrest that we have hypothesized, which would in one sense violate the first but not the fourth amendment, can perhaps be sharpened by imagining a society where protections against unreasonable searches and seizures include a zealously enforced exclusionary rule but where religious expression is strictly regulated. In such a society, there obviously would be no reason to suppress evidence seized from DeFillippo because in that society his arrest and search would constitute perfectly acceptable law enforcement conduct. In our society, the arrest would be unlawful not because it was an unreasonable search and seizure, but rather because it would interfere with the free exercise of religion.

380. The most obvious method of challenging this hypothetical ordinance would be through a motion to dismiss on first amendment grounds.

381. *See, e.g.*, Michigan v. DeFillippo, 433 U.S. at 36 (warrantless arrest in public place constitutional if officer has probable cause); Adams v. Williams, 407 U.S. 143, 148-49 (1972) (same); Carroll v. United States, 267 U.S. 132, 155-56 (1924) (same).

mistake was in thinking that contempt was an offense against the United States, this result would be acceptable. For even if a warrant is required to set in motion the contempt process or to revoke bond, the function of the warrant here is fundamentally different from the warrant requirement of the fourth amendment.[382] Had the *Williams* court relied on *DeFillippo* to conclude that no fourth amendment violation had occurred, however, the Fifth Circuit would not have had this occasion to create its good faith exception to the exclusionary rule.[383]

The other Supreme Court authority that the *Williams* court relied on to support the technical violation facet of the good faith exception is a retroactivity case, *United States v. Peltier*.[384] In that case, roving border patrol agents discovered marijuana during a warrantless search of Peltier's car seventy miles from the Mexican border.[385] At the time it was conducted, the search conformed to regulatory standards previously upheld by lower federal courts.[386] In the interval between the search and Peltier's trial, however, the Supreme Court in *Almeida-Sanchez v. United States*[387] struck down these standards as unreasonable. The *Peltier* Court declined to apply *Almeida-Sanchez* retroactively to invalidate the search.[388] It reasoned that the border patrol agent had acted "in good-faith compliance with then-prevailing constitutional norms"[389] and therefore that retroactive application of *Almeida-Sanchez* would not serve the purposes of the exclusionary rule.[390]

The *Williams* court's reliance on *Peltier* was misplaced. *Peltier* was a retroactivity case; *Williams* was not. By its very nature as a retroactivity case, *Peltier* was concerned with the applicability of a standard that the Supreme

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382. In this instance the role of the warrant would be merely procedural. *Compare* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (search of customer present during execution of search warrant for premises violates fourth amendment, which protects people not places) *with* 622 F.2d at 837-38 (by analogy to Federal Rule of Criminal Procedure 42, warrant requirement for contempt "merely procedural").

383. This is not to say that the Court's decision in *DeFillippo* is without difficulties. It is worth noting that the Michigan statute was challenged below and held unconstitutional on both fourth amendment and due process grounds. *See* People v. DeFillippo, 80 Mich. App. 197, 201, 203, 262 N.W.2d 921, 923-24 (1977) (ordinance void for lacking reasonable notice of what constitutes crime and for undercutting reasonable suspicion standard of *Terry*), *rev'd*, 443 U.S. 31 (1979). The Supreme Court, however, focused only on the unconstitutional vagueness of the statute and assiduously avoided addressing the independent fourth amendment issue. *See* 443 U.S. at 34 (Michigan interlocutory appeal held statute "unconstitutionally vague"). The Court overlooked the fact that there is a doctrinal affinity between the principles that an excessively vague statute violates due process and that an arrest without probable cause (or investigatory detention without articulable suspicion) violates the fourth amendment. Each of these rules seeks to limit police discretion; each seeks to curb capricious or discriminatory law enforcement by requiring relatively clear-cut standards for when the police may act. *Compare* Delaware v. Prouse, 440 U.S. 648, 663 (1978) (invalidating stops made for no articulable reason as encouraging unbridled police discretion) *with* Papacristou v. City of Jacksonville, 405 U.S. 156, 162, 168 (1972) (invalidating statute for vagueness because gives unfettered discretion to police).

384. 422 U.S. 531 (1975).

385. *Id.* at 532-33.

386. *Id.* at 540.

387. 413 U.S. 266 (1973).

388. 422 U.S. at 542.

389. *Id.* at 536, 540.

390. *Id.* at 539, 542. The *Peltier* Court identified deterrence and judicial integrity as the purposes of the exclusionary rule. The Court concluded that applying *Almeida-Sanchez* retroactively would serve neither a deterrent purpose, because compliance with constitutional norms should be encouraged rather than deterred, nor the imperative of judicial integrity, because no willful disobedience was being condoned by the court. *Id.* at 536.

Court had established before *Peltier* was decided. In *Williams*, there was no change in constitutional standards between arrest and trial. The standard for lawful arrest was, and still is, probable cause. If Markonni violated Williams' fourth amendment rights when he arrested her, he violated prevailing—albeit imperfectly articulated—constitutional norms.

An even more disturbing aspect of the *Williams* decision is that the court did not glean from *Peltier* the importance of articulating norms. Unlike the Supreme Court, the *Williams* court was content to leave the norms indefinitely inchoate.[391] It is only because of the first majority's opinion that we know Markonni's actions were, in the court's view, legal.[392] From the perspective of the second opinion, however, the first opinion is wholly unnecessary because the second majority requires only that Markonni have acted "in good faith and in reasonable though mistaken" belief that his actions were lawful.[393] Thus, the question whether Markonni's understanding of the law was indeed mistaken would remain unanswered, and the exclusionary rule would not apply to the fruits of his conduct. As argued in the previous section, unless the court determines the propriety of the conduct, future conduct of similar nature will necessarily be reasonable. Thus, the circle is complete, and Markonni and other law enforcement officers can go on indefinitely arresting for violations of conditions of release, in blissful but reasonable ignorance of what the law requires. Surely, this is not what the Supreme Court's decision in *Peltier* countenanced.[394]

Good Faith Mistake Facet. The scraps of authority that the *Williams* court ferreted out to support the good faith mistake facet of the exception provide even less sustenance than the authority it advanced to support the technical violation exception. The court relied primarily on the Supreme Court's

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391. 622 F.2d at 840 (error to suppress heroin regardless whether Williams' violation of bond condition was crime warranting arrest).

392. *Id.* at 839 (first majority opinion) (arrest for criminal contempt arising from breach of court order restricting travel valid therefore search incident to arrest proper).

393. *Id.* at 840 (second majority opinion).

394. *See* 422 U.S. at 535-39 (by implication) (whether to apply exclusionary rule retroactively presupposes courts will have new constitutional principles to apply).

In addition to Supreme Court opinions, the *Williams* court cited earlier Fifth Circuit opinions that similarly lend scant support for the exception. In United States v. Carden, 529 F.2d 443 (5th Cir. 1976), and United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971), the court did nothing more than anticipate Michigan v. DeFillippo, 443 U.S. 31 (1979). In each, the court stated that an arrest pursuant to a statute violative of due process did not necessarily violate the fourth amendment. *See* United States v. Carden, 529 F.2d at 445 (dictum) (arrest made in good faith reliance on statute not yet declared unconstitutional is valid regardless of statute's actual constitutionality); United States v. Kilgen, 445 F.2d at 289 (court's overturning conviction due to invalid statute does not automatically render previous arrest illegal).

The *Williams* court also relied on United States v. Hill, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S 931 (1975). In that case, however, the court was not at all concerned with the officer's good faith. It merely held that a formal error in the warrant application procedure that does not violate the fourth amendment need not lead to suppression. *Id.* at 322 (no fourth amendment violation when warrant issued on deficient affidavit but bolstered by sworn oral testimony in front of issuing magistrate). The *Williams* court's reliance on United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979), is similarly misplaced. That case did not even raise a fourth amendment issue. The court merely declined to extend the exclusionary rule to suppress evidence obtained in violation of the Posses Comitatus Act, 18 U.S.C. § 1385 (1976), which prohibits military involvement in civilian law enforcement. 594 F.2d at 85. Thus, even the Fifth Circuit precedent that the *Williams* court managed to muster fails to support the technical violation branch of the good faith exception.

decision in *United States v. Janis*.[395] The central issue in *Janis* was whether to extend the exclusionary rule to a federal civil proceeding by or against the United States when the contested evidence was seized unlawfully by a state police officer.[396] This issue is completely irrelevant to *Williams*, which dealt with the admissibility at a federal criminal trial of evidence seized illegally by federal officials. Moreover, the Court's reasoning in *Janis* also lends no support to the good faith exception. The holding in *Janis* in no way turns on the good faith of the arresting officers, but solely on the Court's determination that any additional deterrent effect on state officials of extending the rule to federal civil proceedings was outweighed by the costs of suppression.[397] Finally, *Janis* does not support the good faith mistake facet of the exception because the officers' mistake in *Janis* involved reliance on a technically deficient warrant rather than a factual error.[398]

The *Williams* court also relied on *Michigan v. Tucker*,[399] which is probably best understood as yet another retroactivity case. Moreover, *Tucker* is not even a fourth amendment case; rather it is a fifth amendment case concerning derivative use of a tainted statement.[400] The *Tucker* Court reversed a state

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395. 428 U.S. 433 (1976).

396. *Id.* at 434.

397. *Id.* at 454.

398. The warrant relied on was insufficient under Spinelli v. United States, 393 U.S. 410 (1969), which was decided three weeks before Janis' trial but after the search had taken place. United States v. Janis, 428 U.S. at 437. Although the Court has never decided whether *Spinelli* represented a break with prior law and should therefore be denied retroactive effect, this sequence of events in *Janis* may have played some part in the Court's decision. In his dissenting opinion in Desist v. United States, 394 U.S. 244 (1969), Justice Harlan used *Spinelli* as an example of a fourth amendment decision that would be given retroactive effect because it merely explicated the pre-existing probable cause standard. *Id.* at 263 (Harlan, J., dissenting).

399. 417 U.S. 433 (1974). *Tucker* and *Peltier* provided Justice Rehnquist with an opportunity to discuss his view of the exclusionary rule as a remedy with limited purposes. In his *Peltier* opinion, he cited both United States v. Calandra, 414 U.S. 338, 348 (1974) (exclusionary rule judicially created remedy to safeguard rights through deterrent effect rather than personal constitutional right of aggrieved; therefore application restricted to areas where remedial objectives best served), and Michigan v. Tucker, 417 U.S. 433, 447 (1974) (where official action pursued in complete good faith, deterrence rationale loses much of its force).

400. Michigan v. Tucker, 417 U.S. at 439. The relevance of *Tucker* to a fourth amendment case like *Williams* is questionable because *Tucker* proceeds from the premise that the *Miranda* requirement is a mere sub-constitutional judicial creation. *See id.* at 446 (police conduct departed from prophylactic standards but did not abridge rights). Fourth amendment standards, on the other hand, are constitutionally mandated, even if the fourth amendment exclusionary rule is not. *See* United States v. Peltier, 422 U.S. 531, 542 (1975) (fourth amendment does not require suppression under particular circumstances even if fourth amendment rights violated). Yet the Court itself has cited *Tucker* in the fourth amendment context. *See id.* at 539. *See generally* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118, 120, 123 & n.131 (1978).

Surely both *Tucker* and *Peltier* provide much material from which the Court's more skillful domino players may yet, if they are inclined, reduce exclusionary rule protections. *Cf.* Amsterdam, *supra* note 88, at 351 (skillful domino players have prescient purpose in moves they make, such as explanatory statement in one opinion as basis for extension in different situation). The Supreme Court, however, has not followed the most extreme implications of either opinion. Indeed, as discussed in text below, the Court's actions may repudiate some of those implications, particularly in cases where the police relied on statutes expressly authorizing unconstitutional searches or seizures. *See, e.g.*, Payton v. New York, 445 U.S. 573, 574, 600 (1980) (statute authorizing warrantless entry into suspect's home for routine felony arrest does not outweigh constitutional standard of reasonableness); Ybarra v. Illinois, 444 U.S. 85, 95-96 (1979) (statute authorizing detention and search of person present when officers executing search warrant for premises does not outweigh long prevailing constitutional standard of probable cause).

court decision[401] suppressing evidence that the police had discovered by following a lead which Tucker inadvertently provided during an interrogation not meeting the standards subsequently pronounced in *Miranda v. Arizona*.[402] As in *Peltier*, when the Court decided *Tucker* it had already articulated the constitutional standards to govern future police conduct.[403] Of course, in *Miranda*, when the Court first promulgated those standards, it excluded the evidence.[404] As noted above, the *Williams* court would decline both to articulate the controlling constitutional standards and to apply the exclusionary rule. Finally, the mistake in *Tucker* was, as in *Janis*, legal rather than factual. Thus, *Tucker* provides no support for the factual mistake branch of the court's exception.

Precedent Ignored. Not only did the *Williams* court cite cases that fail to support the good faith exception, but, more importantly, it largely ignored recent Supreme Court decisions with which it is irreconcilable. *Ybarra v. Illinois*,[405] the one case that the *Williams* court tried to distinguish, provides a good example.

Ventura Ybarra was patronizing the Aurora Tap Tavern when the police arrived to execute a search warrant for the tavern and its bartender.[406] Upon entering the tavern, the officers announced their purpose and proceeded to frisk each of the patrons for weapons under the authority of an Illinois statute.[407] During this search, the officers discovered heroin in Ybarra's pants pocket.[408] The Court held that none of the facts supporting the warrant, and nothing learned while executing it, gave the officers probable cause to arrest or search Ybarra.[409] Despite the statute, the Court held the search unconstitutional,[410] and reversed Ybarra's conviction because the drugs should have been suppressed.[411] The Court distinguished *DeFillippo* on the ground that, unlike the statute in *Ybarra*, the statute in *DeFillippo* did not purport to allow searches without probable cause.[412] Indeed, it did not purport to authorize searches at all but only to create a new substantive offense. Thus, all searches under the *Ybarra* statute violated the fourth amendment, whereas only some searches under the *DeFillippo* statute did.[413] The *Williams* court utterly ig-

401. 417 U.S. at 435, 447-50.
402. 384 U.S. 436 (1966).
403. The Court noted that the officers in *Tucker*, acting before these standards were announced in *Miranda*, were "guided, quite rightly, by the principles established in *Escobedo v. Illinois*, 378 U.S. 478 (1964)." 417 U.S. at 447.
404. 384 U.S. at 476.
405. 444 U.S. 85 (1979).
406. *Id.* at 88-89.
407. *Id.* The statute authorized law enforcement officers to detain and search any person found on premises being searched pursuant to a warrant to protect the officers from attack and prevent the disposal or concealment of anything described in the warrant. *Id.* at 87.
408. *Id.* at 89.
409. *Id.* at 90-92. The Court also rejected the argument that the search was proper either under *Terry* or under an extension of *Terry*. *Id.* at 92-96.
410. *Id.* at 96 n.11. The Court stated: "This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches." *Id.*
411. *Id.* at 90, 96.
412. *Id.* at 96 n.11.
413. *Id.*

nored this obvious distinction in its rush to shield from the exclusionary sanction all unconstitutionally seized evidence that is the fruit of "reasonable good faith" police action.[414]

The *Williams* court, however, did endeavor to explain *Ybarra*: "Exclusion of evidence seized without any probable cause is an entirely different question from suppression of evidence seized upon a good-faith and reasonable belief in the existence of probable cause."[415] Applying the *Williams* court's rationale, however, the officers in *Ybarra* would have been excused under the good faith exception. The Illinois legislature told them that their frisks were proper, and no authority had since ruled otherwise. Their conduct seemed to fit perfectly into the Fifth Circuit's exception to the exclusionary rule for technical violations committed when an officer "rel[ies] upon a statute which is later ruled unconstitutional."[416]

Alternatively, the officers in *Ybarra* might reasonably have thought that probable cause was not required because the Supreme Court has approved several types of intrusions in which officers lack probable cause.[417] The search in *Ybarra*, however, did not sufficiently resemble any of these intrusions.[418] If a relevant distinction exists between these different types of fourth amendment violations—searches conducted in the mistaken belief that probable cause was present[419] and searches conducted in the mistaken belief that probable cause was not necessary[420]—the *Williams* court failed to articulate it.[421]

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414. *See* 622 F.2d at 847 (when conduct taken in reasonable, good faith belief that it was proper, court shall not apply exclusionary rule).

415. *Id.* at 846.

416. 622 F.2d at 841 (quoting Ball, *supra* note 311, at 638-39).

417. *See, e.g.*, Michigan v. Summers, 101 S. Ct. 2587, 2595 (1981) (decided after *Ybarra* and *Williams*) (approved detention of homeowner without probable cause during execution of valid warrant to search home for contraband); Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977) (per curiam) (approved order to traffic offender to exit lawfully stopped car though no probable cause or articulable suspicion); United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (approved brief roving border patrol vehicle stops near border and interrogation of occupants on reasonable articulable suspicion of illegal aliens although no probable cause); Terry v. Ohio, 392 U.S. 1, 30 (1968) (approved protective stop and frisk for weapons on reasonable articulable suspicion although no probable cause).

418. *Compare* Ybarra v. Illinois, 444 U.S. 85, 91-96 (1979) (detaining and searching customer merely present on searched premises unlawful because no probable cause, despite prevailing statutory authority) *with* Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977) (per curiam) (ordering traffic offender out of lawfully stopped car lawful without probable cause) *and* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (dictum) (briefly stopping car in border area lawful on articulable suspicion without probable cause) *and* Terry v. Ohio, 392 U.S. 1, 30 (stopping suspect and frisking for weapons lawful without probable cause as long as carefully limited and based on articulable suspicion).

419. *See* Johnson v. United States, 333 U.S. 10, 13 (1948) (mistaken belief that opium odor outside hotel room of unknown occupant constituted probable cause to search); United States v. Di Re, 332 U.S. 581, 587 (1947) (mistaken belief that defendant's mere presence in suspected car constituted probable cause).

420. *See* Torres v. Puerto Rico, 442 U.S. 465, 472 (1979) (mistaken belief that no probable cause necessary because airport search "functional equivalent" of border search); Dunaway v. New York, 442 U.S. 200, 216 (1979) (mistaken belief that no probable cause necessary because custodial questioning lesser intrusion than normal arrest); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (mistaken belief that no probable cause necessary for spot check of motorist's license and registration).

421. Although several Supreme Court decisions express doubts about the efficacy of the exclusionary rule, they would not support the *Williams* outcome because none of the decisions permit evidence obtained in violation of prevailing fourth amendment standards to be used directly in the government's case-in-chief. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 484-86 (1976) (exclusionary rule not extended to federal habeas corpus claim by prisoner previously afforded full and fair consideration of fourth amendment claim because minimal value for judicial integrity or deterrence); United States v. Janis, 428 U.S. 433, 454 (1976) (exclusionary rule not extended to federal civil proceeding because insufficient

Moreover, in a broad range of decisions, the Supreme Court has expanded the contours of fourth amendment protections in ways that would be unforeseeable to even the most prescient police officers. For example, in *Chimel v. California*,[422] the Court held that a search incident to an arrest in a residence is unreasonable if it extends beyond the immediate reach of the arrestee.[423] In *Katz v. United States*,[424] the Court held that eavesdropping or wiretapping constitutes a search even if it does not involve a physical trespass.[425] In *Delaware v. Prouse*,[426] the Court held that random traffic stops constitute unreasonable fourth amendment intrusions.[427] In *Payton v. New York*,[428] the Court held that unless there are exigent circumstances officers must secure a warrant before they may enter a person's home to arrest her.[429] In *Steagald v. United States*,[430] decided after *Williams*, the Supreme Court extended *Payton* to require a search warrant before officers may enter the home of a third party to make an arrest pursuant to a warrant.[431]

Although to one degree or another these decisions may have been prefigured by earlier opinions, they were sufficiently unforeseeable that the officers who searched Chimel's home, entered to arrest Payton and Steagald, eavesdropped on Katz, or stopped Prouse, all would pass a test of reasonable, good faith conduct. This consideration is one of the factors that has led the Court to apply such decisions only prospectively.[432] In keeping with traditional practice, however, the Court has not paused to consider whether to withhold the

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likelihood of deterrence); United States v. Calandra, 414 U.S. 338, 354 (1974) (exclusionary rule not extended to grand jury proceeding because insufficient incremental deterrence).

422. 395 U.S. 752 (1969).

423. *Id.* at 768 (overruling United States v. Rabinowitz, 339 U.S. 56 (1950), and Harris v. United States, 331 U.S. 145 (1947)).

424. 389 U.S. 347 (1967).

425. *Id.* at 353 (overruling Goldman v. United States, 316 U.S. 129 (1942), and Olmstead v. United States, 277 U.S. 438 (1928)).

426. 440 U.S. 648 (1979).

427. *Id.* at 663 (case of first impression).

428. 445 U.S. 573 (1980).

429. *Id.* at 574 (denying permissibility of entry into suspect's home to make warrantless arrest as expressly left open in United States v. Watson, 423 U.S. 411, 418 n.6 (1976)).

430. 101 S. Ct. 1642 (1981).

431. *Id.* at 1644.

432. The Supreme Court has ruled that three factors are to be considered in deciding whether a decision establishing a "new" rule of law should be given retroactive effect: (1) the purpose of the new standards; (2) the extent of reliance upon old standards by law enforcement authorities; and (3) the effect of retroactive application on the administration of justice. Stovall v. Denno, 338 U.S. 293, 297 (1967). This approach was first formulated in Linkletter v. Walker, 381 U.S. 618 (1965), where the issue was whether *Mapp v. Ohio*, extending the exclusionary rule to the states, should be given retroactive effect. *Mapp* did not, of course, create "new" fourth amendment law, but simply required the states to provide a specific remedy for conduct that had been unconstitutional since *Wolf v. Colorado*. Nevertheless, the Court denied retroactive effect to *Mapp*. As the Court assessed the three factors: (1) the primary purpose of the exclusionary rule, deterrence of police misconduct, would not be advanced by making the rule retroactive, and "the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late," *id.* at 637, (2) the states had reasonably relied on prior law in failing to enforce the fourth amendment through the exclusionary sanction, and (3) retroactive application would: "tax the administration of justice to the utmost," because:

> Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory [sic] will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

benefits of the exclusionary rule from the defendants in these cases on the theory that the searches were conducted in reasonable good faith. Yet, the *Williams* court would withhold the benefit of the exclusionary rule to the defendant without either announcing the new law or clarifying the old. Thus, its approach is wholly inconsistent with the principles upon which the Supreme Court has traditionally resolved fourth amendment issues.

Even more strikingly, the *Williams* court ignored *Whitely v. Warden*,[433] in which the Supreme Court suppressed evidence despite the undisputed good faith of the arresting officers.[434] In *Whitely*, the arresting officers received a radio bulletin that a warrant was out for the defendants' arrest.[435] The officers had no reason to know that the affidavit underlying the warrant was insufficient.[436] Based on the radio bulletin, the officers arrested the defendants and uncovered stolen property[437] during a subsequent search of their car.[438] Although the conduct of the arresting officers was unquestionably in good faith, the Supreme Court ordered the evidence suppressed, holding that the arrest and search violated the defendants' fourth amendment rights.[439] Although the *Williams* court did not say whose good faith was at issue, it implied that the relevant inquiry is into the good faith of the arresting officer.[440] If this is true,

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Id. at 637-38.

This analytical approach was then extended in Desist v. United States, 394 U.S. 224 (1969), where the issue was whether *Katz v. United States*, a decision extending substantive fourth amendment protections, should be given retroactive effect. It is now the test not only for "new" fourth amendment decisions, but for constitutional decisions in other areas of criminal procedure. *See* Stovall v. Denno, 388 U.S. 293, 299-301 (1967) (Court declines to apply decisions in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), retroactively).

When the retroactivity of a "new" fourth amendment decision is at issue, the first factor will always cut strongly—indeed, it appears, decisively—against retroactive application. Because in the Court's view the only purpose of the exclusionary rule is to deter, there is no point in applying it retroactively to police conduct that has already occurred, and which was permissible under prior law. The second factor, whether relevant officials reasonably relied on prior law, turns on the degree to which the "new" decision represents a break with prior law. Normally, the relevant officials are the police, and the Court has been generous in finding that reliance was reasonable. In United States v. Peltier, 422 U.S. 531, 542 (1975), for example, the Court held that Almeida-Sanchez v. United States, 413 U.S. 266 (1973), was non-retroactive even though it did not constitute, at least to the dissenters, a "sharp break" with the past. *See* 422 U.S. at 548 (Brennan, J., with Marshall, J., dissenting) (*Peltier* good illustration of dangers of addressing prospectivity when "sharp break" standard not met). *See also* Desist v. United States, 394 U.S. 244, 276-77 (1969) (Fortas, J., dissenting) (in refusing to apply *Katz v. United States* retroactively, Court rewards police who unreasonably relied on clearly discredited doctrine of *Olmstead v. United States*, and penalizes police departments that follow developing case law). The lower courts, too, have been quick to find reasonable reliance on prior law. *See* 3 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 11.5, at 696 n.58 (citing cases). Finally, the third factor, which since *Linkletter* seems to have become something of a make-weight, also has invariably counted against retroactive application of fourth amendment decisions because applying such decisions retroactively is a "difficult and time-consuming task." Desist v. United States, 394 U.S. at 251. In addition, of course, application of the exclusionary rule has no bearing on guilt or innocence. Thus, the short of it is that the Supreme Court has denied retroactive effect to every one of its fourth amendment decisions that even arguably established a "new" rule of law.

433. 401 U.S. 560 (1971).

434. *Id.* at 569.

435. *Id.* at 563.

436. *Id.* at 568.

437. *Id.* at 563.

438. *Id.*

439. *Id.* at 568-69.

440. *See* 622 F.2d at 840, 846-47 (referring to "officers in the course of actions . . . taken in good faith" and later referring to "conduct" without specifying whose, but concluding that arresting Agent Markonni acted in good faith).

however, *Williams* is totally inconsistent with *Whitely*. *Williams* would insulate an arresting officer whenever an independent third party obtained a warrant.[441]

The *Williams* court's marshaling of secondary material to support the good faith exception is equally unpersuasive. The principal scholarly support for the second *Williams* opinion is Edna F. Ball's article on the "reasonable" exception to the exclusionary rule.[442] Professor Ball argues for an exception to the exclusionary rule by analogizing to a series of nineteenth-century admiralty cases contributing to the development of the concept of probable cause. She notes that in these cases of seizure and prize and suits for malicious prosecution the defendant could usually assert a good faith reasonable mistake as at least a partial defense.[443] From this, she argues that a similar defense should be available to suppression of evidence motions because fourth amendment claims also involve probable cause questions.[444]

Professor Ball's article contains some interesting material, but her central argument is unsound.[445] First, in most of the tort cases that she discusses, the defendant who prevailed on a good faith reasonable mistake defense was not entirely vindicated. In seizure and prize cases, for example, he could escape punitive damages, but would still be liable for actual damages.[446] Thus, a more appropriate analogy to these early civil cases lies in the present Supreme Court law of suppression. The police officer who arrests without probable cause will lose the immediate fruits of his misconduct, but derivative fruits, evidence obtained only as an indirect result of his misconduct, may be admissible if he acted in good faith.[447]

More importantly, the fact that the law of suppression and the law of prize and capture share the concept of probable cause does not imply any further similarity. Professor Ball might just as well argue that because suppression

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441. *But cf.* Whitely v. Warden, 401 U.S. at 568 (otherwise illegal arrest cannot be insulated from challenge by instigator's decision to rely on fellow officers to arrest). In fact, as far back as 1959, the Supreme Court expressly rejected the argument that the good faith of the arresting officer can substitute for probable cause. *See* Henry v. United States, 361 U.S. 98, 102 (1959) ("good faith on the part of arresting officers is not enough"). In the words of Justice Stewart in Beck v. Ohio, 379 U.S. 89 (1964), "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Id.* at 97 (warrantless public arrest and incident search unlawful because uncorroborated tip insufficient to constitute probable cause). If subjective good faith need only be "reasonable" for evidence to survive suppression, then all that insulates us from the unbridled police discretion that Justice Stewart foresaw is an ad hoc, virtually standardless, judicial review of "reasonableness."

442. Ball, *supra* note 311.

443. *See id.* at 639-40 (good faith total defense to malicious prosecution and partial defense against punitive damages in seizure and prize).

444. *Id.* at 639.

445. She is guilty of what an old logic textbook deemed "false analogy" and "a copious source of error." G. JOYCE, PRINCIPLES OF LOGIC 285 (3d ed. 1926). "Few things carry conviction to the mind so much as a striking analogy, and few things can be more misleading." *Id.*

446. Ball, *supra* note 311, at 639.

447. *See* United States v. Ceccolini, 435 U.S. 268, 279 (1979) (testimony of witness admissible because sufficient attenuation between illegal search and finding witness); *cf.* Dunaway v. New York, 442 U.S. 200, 216 (1979) (confession inadmissible because no intervening events between illegal detention and confession); Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (confession inadmissible because state failed to show attenuation between illegal arrest and confession). Although the Court uses a multifactor analysis to determine attenuation, the flagrancy of the official misconduct is of particular importance. 422 U.S. at 603-04.

issues as well as prize and capture cases involve concepts of probable cause, both ought to be heard in admiralty. Or she might also argue that courts should adopt another doctrine from the law of prize and capture for the law of the fourth amendment. In old admiralty cases, a seizure of a vessel was held justified with or without probable cause if, after the fact, the vessel turned out to be subject to seizure.[448] Fourth amendment law, however, has always been otherwise; an unlawful search cannot be made lawful by what it turns up.[449] The incorporation of this admiralty rule into the fourth amendment would do away with the suppression doctrine altogether: If the search were fruitless, no evidence would be found to suppress; if it were successful, no fourth amendment violation would be found no matter how glaring the absence of probable cause. [450]

The court also relied on a short piece by Professor Charles Alan Wright,[451] which he first delivered as a lecture to undergraduates.[452] Wright's same basic arguments for a watered-down exclusionary rule have been discussed extensively elsewhere and will not be repeated here.[453] In any event, the *Williams*

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448. The admiralty cases that Ball relies on involved seizures of ships that it turned out were not subject to forfeiture. Probable cause was set up as a defense by the captain of the capturing ship. When the seized ship was subject to capture, that was the end of the matter. The capturing ship was liable only if the seized ship was not subject to forfeiture *and* there was no probable cause to believe that it was. *See* Slocum v. Mayberry, 15 U.S. 1, 9-10, 2 Wheat. 1, 5 (1817); The Charming Betsy, 6 U.S. 64, 120-22, 2 Cranch 34, 68-70 (1804). The seizure, in other words, could be justified by its results.

Justice Rehnquist and Chief Justice Burger have also suggested that the Court may have gone wrong in Byars v. United States, 273 U.S. 28 (1927), when it rejected the doctrine that a search is justified by what it turns up and held that probable cause could only be measured by objective facts known to the officer prior to the search. *Id.* at 29. "This result," Justice Rehnquist has written, "while taken for granted today, was not inevitable. The Court certainly could have held that discovery of the article sought is compelling evidence that the search was justified, or that any violation of the Fourth Amendment in such a case was harmless error." California v. Minjares, 443 U.S. 916, 921 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). This doctrine, to use Professor Amsterdam's terminology, presupposes a purely "atomistic," rather than "regulatory" interpretation of the fourth amendment. *See* note 88 *supra*.

449. United States v. Di Re, 332 U.S. 581, 595 (1947); Byars v. United States, 273 U.S. 28, 29 (1927).

450. Professor Ball anticipated such objections and attempted a rejoinder. But it is only a rephrasing of her basic argument, with all of its weaknesses intact:

> One may well ask why the teaching of early civil cases is relevant to the development of modern rules of criminal procedure . . . . Putting aside the conceptual overlap of tort and crime, perhaps the best answer is that the nineteenth century civil cases dealing with unintentional mistake concerning probable cause gave early courts their only opportunities to consider the definition of probable cause and the effect that good faith would have on the implementation of that doctrine. Since the Court has been willing to use these decisions to define probable cause in later criminal cases, it is not inappropriate to look to them for guidance in the area of good faith as well.

Ball, *supra* note 311, at 641 (footnotes omitted). The overlap to which Professor Ball refers is not as great as she suggests. The similarity is between the elements of torts and the elements of crimes. The only similarity that would help Professor Ball's argument would be one between torts and the suppression doctrine. The analogy between these two areas, however, is in fact quite weak. That Professor Ball's article persuaded the *Williams* court demonstrates how eager it was to adopt the good faith exception.

451. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

452. *Id.* at 736.

453. *See generally* Geller, *supra* note 70, at 656-84.

Professor Wright asserted that empirical evidence failed to establish the prophylactic efficacy of the exclusionary rule; Wright, *supra* note 452, at 739; that much police activity is not even aimed at securing convictions and therefore cannot be reached by the rule; *id.* at 740; that the police rarely learn whether the evidence they seized was excluded or admitted, or why; *id.*; and that police in fact do not

court both misinterpreted Wright's argument and failed to evaluate his cost-benefit analysis. Wright did not argue for the reasonable good-faith exception embraced by *Williams*. Instead, he favored the American Law Institute (ALI) proposal.[454] This proposal would apply the exclusionary remedy only when there has been a substantial fourth amendment violation.[455]

A more substantive criticism is that Wright misperceived the costs associated with the exclusionary rule, costs that he deemed so excessive as to require a major cut back of the rule.[456] According to Professor Wright, in addition to freeing an assortment of gamblers, junkies, and gun-toters, the rule has freed these heinous criminals of Supreme Court infamy: the child-murderer Coolidge;[457] the brutal rapists, Davis[458] and Bumper;[459] DeForte, a Teamsters official who used his position to extort payments;[460] and Berger, who conspired to bribe a high public official.[461]

Although Professor Wright acknowledged that the suppression of evidence does not always result in the unleashing of a criminal who preys again, he asserted that:

> In most or all of the cases the evidence held to have been obtained illegally was so critical to the prosecution's case that it is unlikely that [the defendants] could be convicted without it. The probable result is that the defendants in these cases, who have been found guilty of heinous crimes, will go free.[462]

Had he checked, Professor Wright would have learned that his assumptions were wrong. Of this group, all three violent offenders were convicted, on remand, without the suppressed evidence.[463] Only DeForte and Berger escaped

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understand the arcane fourth amendment standards that the courts set for their conduct. *Id.* at 740-41. For a discussion of the similar arguments of Professor Oaks, see text accompanying notes 147-60 *supra*.

454. Wright, *supra* note 452, at 745.

455. The ALI test of a substantial violation focuses on: (1) the seriousness of the violation; (2) the effect on the criminal justice system as a whole; and (3) the prejudicial effect to the particular defendant. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3, Commentary 407 (Apr. 15, 1975 Proposed Official Draft). *See generally* Coe, *ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 7 n.22 (1975); Wright, *supra* note 452, at 745.

456. *See* Wright, *supra* note 452, at 742 (rule not justified without evidence that benefit to society outweighs obvious cost of freeing heinous criminals).

457. *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443, 494 (1971) (Black, J., concurring and dissenting) (kidnapping fourteen-year-old, slashed throat, shot in head, and left on side of road)).

458. *Id.* (citing Davis v. Mississippi, 394 U.S. 721, 722 (1969) (rape in victim's home)).

459. *Id.* (citing Bumper v. North Carolina, 391 U.S. 543, 558-59 (1968) (Black, J., dissenting) (twice raped woman at gunpoint, shot her and companion, and left them for dead)).

460. *Id.* (citing Mancusi v. De Forte, 392 U.S. 364, 365 (1968) (union official convicted of extortion)).

461. *Id.* (citing Berger v. New York, 388 U.S. 41, 44 (1967) (bribed Chairman of New York State Liquor Authority)).

462. *Id.*

463. *See* Davis v. State, 255 So. 2d 916, 919, 922 (Miss. 1971) (second conviction on rape upheld with victim's purged testimony read at trial), *cert. denied*, 409 U.S. 855 (1972); North Carolina v. Bumper, 5 N.C. App. 528, 532, 536 (1969) (rape charge not retried but convicted on assault and robbery); note 465 *infra* (Coolidge agreed to plea bargain instead of facing new trial).

Wright was especially reckless in saying that the exclusionary rule would be likely to free Davis. The evidence suppressed was a set of fingerprints taken from Davis during an illegal arrest. Davis v. Mississippi, 394 U.S. 721, 724-25 (1969). Justice Stewart suggested in dissent that the suppression was a useless act. *Id.* at 730 (Stewart, J., dissenting). There was probable cause to rearrest Davis because the victim subsequently identified him as her assailant. *Id.* Another set of fingerprints could be properly obtained, so conviction at retrial was a foregone conclusion. *Id.* The majority did not contest this point. On retrial, properly obtained fingerprints were admitted and Davis was convicted. Davis v.

further punishment.[464] Coolidge and Davis are both still behind bars.[465] Bumper served a substantial portion of his sentence and was granted parole just last year.[466]

As its final secondary source, the *Williams* court cited Judge Friendly's book, *Benchmarks*.[467] Yet, it did so with a simple, conclusory statement indicating that Judge Friendly favored the good faith exception,[468] and overlooking the narrowness of his rationale.[469] Judge Friendly assumes that the exclusionary rule operates only through a crude mode of specific deterrence, punishing the particular offending officer directly to teach him to do better the next time.[470] Judge Friendly's argument, however, ignores the other deterrent mechanisms of the rule discussed earlier in this article.[471] This cursory representation of support from Judge Friendly is misleading,[472] and is indicative of the flimsy authority that the *Williams* court offered for its decison. Thus, the ten judges who filed a special concurrence were surely correct in criticizing their brethren for " 'reach[ing] out' for a vehicle to change a long line of precedent."[473]

State,.225 So. 2d 916, 921 (Miss. 1971) (affirming conviction after retrial). It is surprising that Professor Wright, writing in 1972, missed all this.

464. *See* People v. Berger, 18 N.Y.2d 638, 638 (1966) (government stipulated that without evidence and leads from eavesdropping devices it would have no case), *rev'd on other grounds*, 388 U.S. 41 (1967). There is no reported case indicating that DeForte was ever retried.

465. Telephone conversations with *Coolidge* prosecutor, William Maynard (July, 1981) and *Davis* prosecutor, George Warner (July, 1981).

466. Telephone conversation with *Bumper* prosecutor, Herbert Pierce (July, 1981).

467. 622 F.2d at 841 (citing H. FRIENDLY, BENCHMARKS 260-62 (1967)).

468. *Id.* at 841 (referrring to Friendly as writer "advocating exception").

469. *See id.* (Friendly suggested limiting suppression to fruit of intentionally or flagrantly illegal activity).

470. *See* H. FRIENDLY, BENCHMARKS 260 (1967) ("deter" suggests analogy to criminal law which punishes evil motives rather than mistaken ones; experiencing punishment is the only method of deterrence).

471. *See* notes 146-75 *supra* and accompanying text (rule also deters through general and systemic deterrence).

472. Equally significant is the secondary material that the *Williams* court does not consider. A limitation on the exclusionary rule somewhat similar to *Williams*' "reasonable, good-faith mistake" exception has been proposed before. As mentioned above, the American Law Institute Model Code of Pre-Arraignment Procedure proposed eliminating all but "substantial" breaches from the reach of the rules. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 8.02, Note 1 (Tent. Draft No. 3, 1970) (advocating use of exclusionary rule for seizures violating basic safeguards but not for non-prejudicial minor violations). In fact, the drafters considered but rejected a proposal virtually identical to the *Williams* holding. *See* Coe, *supra* note 455, at 7 (flexible "prejudice test" excluding unlawfully obtained statements and identifications rejected as ambiguous when ALI adopted substantiality test for search and seizure section). A similar test to that contained in the ALI proposal provision has been enacted in North Carolina. *See* N.C. GEN. STAT. § 15A-974(2) (1973) (suppression of evidence obtained as result of "substantial violation" determined by considering interest violated, extent of deviation from lawful conduct, willfulness, and deterrence). The literature concerning these various proposals is already vast; yet the *Williams* court, although undertaking a major refashioning of the exclusionary rule, altogether ignored it. This is not to suggest that the authors of law journal articles are entitled to see their works cited whenever a court later issues a decision involving the same topic. The debate on these questions, however, has been substantial, and the *Williams* court could have profited by exploring the literature more fully.

473. 622 F.2d at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., specially concurring) (quoting Crist v. Cline, 434 U.S. 981, 981 (1977) (Marshall, J., dissenting from order restoring case to calendar for oral argument)).

V. THE GOOD FAITH EXCEPTION IN PRACTICE

This article has examined both the fourth amendment exclusionary rule and the sweeping good faith exception announced by the Fifth Circuit in *United States v. Williams*. It has demonstrated the effectiveness of the rule as a deterrent to police misconduct, and has argued that a good faith exception will substantially undermine that effectiveness. In order to highlight the crucial flaws of the *Williams* approach, this section first describes the mischievous effects the exception will have on lawmaking in both trial and appellate courts. It then examines some typical fourth amendment violations that under the exclusionary rule lead to suppression of illegally-obtained evidence. By comparing the result of these violations under present law with the anticipated result under a good faith exception, the section demonstrates that any gain in successful prosecutions brought about by the application of the exception would be far outweighed by the consequent loss of constitutionally protected privacy.

A. THE GOOD FAITH EXCEPTION IN THE COURTS

1. The Hearing

Williams tells us next to nothing about how a trial court applying the exception should conduct hearings on motions to suppress. While the *Williams* court strained to promulgate its good faith exception in the broadest possible language, it was remarkably reticent in instructing the lower courts how to implement it. Specifically, the decision leaves open three crucial issues: what standards to use in assessing good faith or reasonableness; who will have the burden of proof; and what evidence will be admissible.

First, it is not clear what constitutes good faith or reasonableness in this context. One might suppose that by good faith mistake the court meant an honest mistake, not a sham mistake, but that is of little help. The only enlightenment the court gives as to what constitutes a reasonable mistake is that the officer's belief in the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained, officer to believe that he was acting lawfully."[474]

Second, the court left "for another day" the "proper allocation of the burden of proof."[475] As a consequence, once the defendant shows misconduct, we do not know whether the defendant must also prove bad faith and unreasonableness, or whether the burden shifts to the government to establish that the conduct was in good faith and reasonable.

This confusion raises a third problem. Whatever burden of proof is imposed, the government will present the officer's self-serving claim that he thought his actions were lawful.[476] To refute this assertion, the defendant will

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474. Even this limited guidance seems to have been given as something of an afterthought. 622 F.2d at 841 n.4a.

475. *Id.* at 847.

476. Of course, police perjury may impede accurate finding of fact by the trial court. *See* P. CHEVIGNY, POLICE POWER 187-88 (1969) (empirical study showing significant rise in percentage of police arrest reports in which evidence seized through "abandonment" after *Mapp v. Ohio*; report alleges that decision encouraged police to file false reports); J. SKOLNICK, JUSTICE WITHOUT TRIAL 214-15 (1966) (because judicial decisions have failed to set clear standards, police often reconstruct events to

have to contest the officer's state of mind,[477] thus posing thorny evidentiary problems. It would seem, for example, that a primary focus of the hearing will necessarily be the officer's training. This highlights an anomaly of the good faith exception: proof by the defense that the offending officer was well-trained tends to disprove the officer's claim of good faith by showing that he knew better, while proof by the government that the officer was poorly-trained tends to prove the officer's good faith by showing that he did the best he could. Thus, police departments may have an incentive to leave their officers ignorant of the legal standards governing their conduct because an officer's claim of good faith is more credible if he has no reason to know that his conduct is unlawful.[478] This anomaly has the concomitant negative effects of both punishing police departments that efficiently regulate their officers by holding these officers to a higher standard, and rewarding inept departments by holding their officers to a lower standard.

While the good faith exception's objective requirement of reasonableness will admittedly mitigate these effects to some degree, the incentives introduced by the subjective requirement of good faith remain skewed. Moreover, the reasonableness requirement of the good faith exception raises additional problems of proof. By hypothesis, the exception comes into play only when the exclusionary rule would otherwise require suppression. Thus, however "reasonable" the officer's conduct, it is nonetheless unconstitutional. At some point, something has gone wrong either in the officer's judgment or in his training. The defendant thus must try to establish bad faith, by showing that the officer had sufficient training to know that his actions were unlawful, or unreasonableness, by showing the inadequacy of the officer's training. In either case, *Williams* leaves unresolved whether the defendant will be allowed to call as witnesses the police brass in charge of training and continuing education of line officers. If he is permitted to call these witnesses, then present suppression hearings, which opponents of the exclusionary rule criticize for consuming precious court time,[479] will seem positively fleeting by comparison to those born of the good faith exception. If the defendant is precluded from calling these witnesses, however, how can he make the necessary "expedition

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"fabricat[e] probable cause"); Oaks, *supra* note 103, at 739-42 (increased police fabrication of probable cause in response to *Mapp*); Note, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87, 94-95 (1968) (empirical study demonstrating rise in abandonment claims by police supports conclusion that police have fabricated basis of arrest to meet requirements of *Mapp*).

477. This is, perhaps, one desirable feature of a good faith exception; it would conceivably require police officers to explain in court their understanding of the relevant fourth amendment law and why they felt that their actions were justified under it. This in turn might provide an added incentive for police departments to educate their officers in the law. In practice, however, it is unlikely that trial courts will conduct hearings on motions to suppress like a law school course in criminal procedure. In the end, the officer's bald assertion that he thought he had the right to do what he did will, if unchallenged, establish good faith. Moreover, the exclusionary rule without a good faith exception already provides police departments with the incentive to teach their officers the bounds of constitutionally permissible conduct.

478. *See* Kaplan, *supra* note 131, at 1044 (police department dedicated to crime control would have incentive to leave its officers uneducated about law so that constitutional violations could be labeled inadvertent).

479. *See* note 533 *infra* (citing critics of time spent on suppression motions).

into the mind of the police officers"[480] to prove bad faith or unreasonableness under *Williams*?

In practice, few trial courts will permit time-consuming inquiries into the training and motivations of individual police officers. The good faith exception gives trial courts a convenient method by which to side-step these questions, as well as the underlying fourth amendment issue itself, by simply excusing the officer's alleged mistakes as reasonable ones. Inevitably, a sliding scale test of general reasonableness will become the touchstone of the fourth amendment.

Indeed, the good faith exception, coupled with the operation of other forces, works to ensure this outcome. To begin with, the good faith exception's factual mistake facet is intelligible only as a test of general reasonableness,[481] and its technical violations facet will stem the development of fourth amendment doctrine.[482] What rules we now have will slowly atrophy, and new ones will not be generated to take their place. Moreover, trial judges are averse to suppressing probative evidence, and an excuse of general reasonableness provides a virtually unreviewable way to avoid doing so. We can expect, then, to find judges' thumbs on the reasonableness side of any sliding scale.[483] Even a judge sensitive to fourth amendment interests will find himself in difficult straits, for as Professor Amsterdam has observed, the difficulty with a reasonableness test is that "it converts the fourth amendment into one immense Rorschach blot. . . . The varieties of police behavior and the occasions that call it forth are so innumerable that their reflections in a general sliding scale approach could only produce more slide than scale."[484] In practice, he concludes, "appellate courts defer to trial courts, and trial courts defer to the police."[485] Thus, "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."[486]

2. The Appeal

For the most part, trial courts simply apply the law within the bounds set by appellate courts. Appellate courts, however, both correct errors of law and develop the law. As a result, the consequences of the good faith exception are even more profound at the appellate level because courts that adopt the exception will not develop fourth amendment law. If evidence is admissible under the good faith exception, appellate decisions that resolve the fourth amend-

480. Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., with Harlan & Stewart, JJ., dissenting from dismissal of certiorari) (inquiry into minds of officers would produce grave and fruitless misallocation of judicial resources).

481. *See* text accompanying note 326 *supra*.

482. *See* text accompanying note 344 *supra*.

483. "So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level." Kaplan, *supra* note 131, at 1045.

484. Amsterdam, *supra* note 88, at 393-94. Moreover, "[i]t is always easier to convince jurors that a person's illegal action was inadvertent than it is to convince them it was purposeful." Kaplan, *supra* note 131, at 1045 n.93 (citing R. KEETON, TRIAL TACTICS AND METHODS 291-92 (2d ed. 1973)).

485. Amsterdam, *supra* note 88, at 394.

486. Beck v. Ohio, 379 U.S. 89, 97 (1964), *quoted in* Amsterdam, *supra* note 88, at 394.

ment issue would be superfluous. To be sure, in some instances under the good faith exception, a court will have to consider what present law required of an officer in order to determine whether his behavior was reasonable.[487] Nevertheless, the issue under the good faith exception is how far the officer's conduct exceeded the limits of existing law. Thus, there would be no occasion to re-examine the limits themselves in the course of determining the officer's reasonableness.[488]

Moreover, the judicial policy against rendering advisory opinions ensures that courts will not examine police conduct held permissible under prior decisions or authorized by statutes because such actions undoubtedly would constitute good faith reasonable conduct. Appellate courts will not issue advisory opinions; the Supreme Court warned against such unnecessary adjudication in *Bowen v. United States*.[489] In *Bowen*, the Ninth Circuit had refused to apply *Almeida-Sanchez v. United States*[490] retroactively.[491] Before deciding the retroactivity issue, however, the Ninth Circuit concluded that the search was illegal. Affirming the decision that *Almeida-Sanchez* should not be applied retroactively, the Supreme Court nevertheless warned:

> This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive . . . . This practice is rooted in our reluctance to decide constitutional questions unnecessarily . . . . Because this reluctance is in turn grounded in the constitutional role of the federal courts . . . the district courts and courts of appeal should follow our practice, when issues of both retroactivity and application of constitutional doctrine are raised, of deciding the retroactivity issue first.[492]

Bowen suggests a similar approach in good faith exception cases. The good faith exception would allow appellate courts to decide that a police officer's reasonable reliance on prior law obviated the need to reach the constitutional question, because the exclusionary rule would not apply in any event. Thus, applying the rationale of *Bowen*, federal courts adopting a good faith exception would not promulgate decisions addressing the fourth amendment

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487. One commentator has asserted that the good faith exception does not preclude examination of the constitutionality of the officers' conduct. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1415 (1977). Under this analysis, appellate courts or the Supreme Court could require trial courts to address fourth amendment issues directly before they evaluate possible good faith exception arguments. *Id.* It is hard to believe that the availability of the good faith exception will result in searching reviews of fourth amendment law, even when courts are required to resolve fourth amendment issues directly before considering good faith exception claims. The good faith exception's implicit message to trial courts and litigants that reasonable fourth amendment violations are permissible means that only the most egregious police conduct would receive close scrutiny under traditional fourth amendment standards, conduct that would have failed the good faith exception standard anyway.

488. The *Williams* court, for example, decided that Agent Markonni had not transgressed the limits of the law enough to merit any discussion of these limits at all.

489. 422 U.S. 916 (1975).

490. 413 U.S. 266 (1973).

491. United States v. Bowen, 500 F.2d 960, 967 (9th Cir. 1974) (search illegal because conducted without warrant or probable cause 49 miles from border; outside scope of *Almeida-Sanchez* permissible border searches), *aff'd on other grounds*, 422 U.S. 916 (1975).

492. 422 U.S. at 920 (citations omitted).

issue.[493]

There are, then, several reasons for believing that the good faith exception will stem the development of fourth amendment law. First, there will be far fewer challenges to arguably illegal searches and seizures. If courts are quick to apply the good faith exception, litigants, recognizing that evidence in their cases will not be suppressed, will stop raising fourth amendment issues. Even if courts ignore or distinguish *Bowen* and issue purely prospective decisions delimiting future permissible police conduct, there will nonetheless be a drop-off in the number of fourth amendment challenges. Defendants want to win their cases, not advance abstract points of law that may benefit others.[494] Thus, regardless of the merits of a defendant's constitutional claim, he will have no incentive to challenge prior decisions if he anticipates that the evidence will be admitted under the good faith exception.[495] Judicial sensitivity

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493. In *Bowen*, the petitioner had been the subject of a routine search at a fixed traffic check point some distance from the Mexican border. Evidence leading to a criminal prosecution was uncovered in the course of the search. Bowen's motion to suppress was denied by the trial court, and the Ninth Circuit affirmed that decision. United States v. Bowen, 462 F.2d 347, 348 (9th Cir. 1972) (per curiam). The Supreme Court granted *certiorari*, but vacated and remanded the case for consideration in light of its decision in *Almeida-Sanchez v. United States*, which held that non-probable cause searches conducted by roving border patrols were unconstitutional. Bowen v. United States, 413 U.S. 915, 916 (1973). On remand, Bowen asked the Ninth Circuit to extend the reasoning of *Almeida-Sanchez* to invalidate fixed check point searches as well. United States v. Bowen, 500 F.2d 960, 962 (9th Cir. 1974) (en banc). The Ninth Circuit agreed that *Almeida-Sanchez* governed such searches, but ruled that it should not be applied retroactively, and therefore upheld the admission of the evidence against Bowen. *Id.*

The Supreme Court again granted *certiorari*. Before the Court, Bowen made the imaginative argument that because his case involved an extension, not merely an application, of *Almeida-Sanchez*, the newly announced law should have been applied in his case even if *Almeida-Sanchez* was non-retroactive. Bowen v. United States, 422 U.S. 916, 919-20 (1975). He argued that he was entitled to exclusion under the Court's uniform practice of "applying new constitutional doctrine in the case that establishes the point." *Id.* at 920. The Court rejected this argument, and noted that the Ninth Circuit should not even have decided Bowen's constitutional claims. *Id.*

It is true that in the *Bowen* situation, another case testing the constitutionality of fixed point searches would, doubtless, eventually arise if the Border Patrol continued to conduct such searches. As it turned out, the Court decided such a case on the very same day as *Bowen*, declaring that a fixed point search that occurred after *Almeida-Sanchez* was unconstitutional. United States v. Ortiz, 422 U.S. 891, 896-97 (1975). Thus, the Supreme Court's directive in *Bowen* that courts decide whether a particular decision should be given retroactive effect before addressing a novel constitutional claim building on that decision, does not tend to foreclose ultimate resolution of the novel claim in the way that the good faith exception does. Consequently, the Court could rule that even when misconduct would be excused under the good faith exception, the fourth amendment question should be resolved in an advisory opinion. There is nothing in *Bowen*, however, to suggest that the Court would reach such a result. Moreover, even in the *Bowen* situation, by ruling as it did, the Court might have permitted a highly intrusive and, as it turned out, unconstitutional practice to continue for the indefinite future. Indeed, the irony is that the more unreasonable it was in terms of fruitfulness, the longer it was likely to continue.

494. The argument may be made that advances in fourth amendment law will come through the litigative strategies of institutional defenders, such as public defender services. This is unlikely for several reasons. First, any single new development in fourth amendment law is likely to require the litigation of a large number of cases that present that issue. This would far exceed the pool of cases available to any one attorney or office. Second, public defenders are notoriously overworked and do not have time to plan the development of fourth amendment law or to litigate every marginal case raising a key point of law in the hope of ultimately changing the law. Third, personnel changes and turn-over would make the execution of any such strategy difficult at best. Finally, changes in fourth amendment law do not have the kind of effect on the professional life of defense lawyers that, for example, liberalized discovery rules have.

495. One commentator has noted that:

> [I]f parties anticipate such a [purely prospective decision] they will have no stimulus to argue for change in the law. Indeed, the recognition of even a substantial possibility of such limita-

to this chilling effect is, of course, the primary reason why decisions that are not given retroactive effect are applied to the litigants whose cases have spawned them.[496] Nevertheless, the very purpose of the technical violations facet of the good faith exception is to ensure that evidence is not suppressed when there has been reliance on prior law. Thus, when a good faith exception is operative, a defendant whose argument for suppression would require the court to overrule, modify, or even merely clarify existing law would have little or no chance for success.

Second, in the cases that do come up, courts will not decide the fourth amendment issue frequently enough to advance fourth amendment law very significantly over time.[497] The good faith exception rests on the premise that fourth amendment violations are acceptable if reasonable. Under this rationale, the courts will categorize only egregious police conduct as violative of the fourth amendment. Courts will most readily find good faith exceptions in close cases, those from which advances in fourth amendment law now come. If the conduct is so close to the line that a judge cannot confidently characterize it as proper or improper, the good faith exception allows the judge to conclude that an officer should not be required to do so either. Thus, we will have few meaningful new decisions refining fourth amendment law.

Third, the good faith exception will have a stultifying effect on the develop-

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tion will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration.

Mishkin, *Forward: The High Court, The Great Writ, and the Due Process of Law and Time*, 79 HARV. L. REV. 56, 61 (1965).

496. In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court refused to apply to one case a rule of law established in two similar cases that the Court decided the same day. Distinguishing between *Stovall*, a habeas corpus collateral challenge, and the two other cases, direct appeals, the Court called *Stovall* a "vehicle" for deciding whether there would be retroactive application of the two direct appeals. *Id.* at 294. Rejecting retroactivity, the Court said:

> We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

Id. at 301.

497. It is essential for an appellate court to receive many cases in order to clarify a particular area of the law. Otherwise, "the bits or slices or splinters which are cast up may be too fragmentary to yield a proper picture or to allow the shaping and joining of complementary hubs and spokes and rims to form a doctrinal wheel." K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 263 (1960). With a continuing set of cases, "the court will see more, learn more from the series; the court will begin to see in the round rather than the flat, and to gain some understanding of the whole in action." *Id.* This may seem to suggest praise for the disease because of the virtues of the remedy applied to it—that repeated fourth amendment violations are desirable because of the exclusionary rule case law that they generate. The problem of police lawlessness, however, is more a condition than a disease, and the ongoing interpretation of the fourth amendment a perpetual societal necessity.

ment of fourth amendment law, as courts adopting it fail to set standards for future police conduct. The second majority opinion in *Williams* itself demonstrates that courts are likely to find good faith exceptions without examining or defining the limits of the law.[498] Under the *Williams* analysis, another officer might well be able to arrest and search a suspect for bond-jumping without fearing suppression of the evidence he obtains. Only after courts discuss the limits of the law will officers be barred from claiming good faith if they engage in the same conduct in another case.

Further, the incentive to develop fourth amendment law under the good faith exception will rest primarily with the government. Every victory for the government in the courtroom will widen the boundaries of lawful police conduct. Since the determination of the fourth amendment issue will not help the defendant who raises it, it will be uneconomical for him to devote already limited resources to contesting this issue. Thus, the fourth amendment argument would be severely lopsided: the government devoting substantial resources, the defendant, comparatively few. Like a ratchet, the law will move in only one direction.[499]

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498. *See* note 353 *supra* (discussing *Richmond v. Commonwealth* and effects of adopting good faith exception).

499. One commentator has recently argued that the good faith exception would have just the opposite effect. He contends that such an exception would would lead courts to interpret the fourth amendment more liberally, that is, as imposing tighter restrictions on the police. Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51 (1980). Bernardi cogently criticizes a series of recent Supreme Court decisions that he suggests have unduly restricted fourth amendment protections. These cases, he argues, might well have been decided differently had there been a good faith exception to the exclusionary rule. Bernardi describes, for example, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), where the Court held that waiver of the right to refuse consent to a search must be knowingly made, as being a case where "the Court has charted a course restricting individuals' protections under the fourth amendment for the sake of avoiding the exclusionary rule." Bernardi, *supra*, at 93. The idea seems to be that if the Court could avoid suppressing evidence when police misconduct has been undertaken in good faith, it would be prepared to pronounce stricter fourth amendment standards.

It is conceivable that if there were no exclusionary rule at all, the Court would be prepared to issue grand, hortatory, liberal, fourth amendment rulings. The only problem is, of course, that without the rule there would be no occasion to issue these rulings, and no effective sanction to enforce them. It makes no sense at all to argue that with a good faith exception the courts would make more liberal fourth amendment law. To begin with, it is clear that the Supreme Court decided *Schneckloth*, and the other cases Bernardi discusses, because it approved what the police had done and not because it simply wanted to avoid suppressing evidence. As the Court said in *Schneckloth*, "where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." 412 U.S. at 227. The Court did not decline to require the police to inform citizens of their right to refuse consent because it feared it would have to suppress evidence where the police bungled, but rather because it felt it would be "impractical" to impose such a requirement. *Id.* at 231.

Moreover, the good faith exception would not, in fact, enable the courts to avoid applying the exclusionary rule in situations such as *Schneckloth*. Once the Court held, as Bernardi suggests it would have, that the police must obtain a knowing as well as voluntary waiver for a consent to search, it would not thereafter be a reasonable good faith mistake to neglect to do so, and evidence would be suppressed. The only effect of the good faith exception would have been to permit the Supreme Court to rule that knowing consent must henceforth be demonstrated, while at the same time allowing Bustamonte's fraud conviction to stand because the police there could not reasonably have known what was expected of them. Bernardi's argument, then, requires us to believe that the Court declined to render a correct constitutional ruling of great importance because it could not bear to free Robert Bustamonte on his bad check charge. Even the Court's harshest critics do not think it quite that short sighted. Finally, Bernardi overlooks that under a good faith exception cases like *Schneckloth* might well not be litigated at all, and so the Court would not have the opportunity to make the liberal fourth amendment law that Bernardi favors.

B. THE GOOD FAITH EXCEPTION AND THE FOURTH AMENDMENT

The good faith exception, then, will promote a general reasonableness standard for fourth amendment violations and stem the development of fourth amendment law. This will itself increase the number of fourth amendment violations that could be prevented if the courts stayed in the business of identifying the lines that separate lawful from unlawful searches and seizures. The good faith exception will affect police conduct in other ways as well. Most fundamentally, as they perceive that courts are often ready to excuse their violations of constitutional norms, the norms themselves will lose the symbolic significance we want the police to attach to them. As the police come to know these norms as only inconsistently binding on them, the educative and moral force of the norms will be weakened. Yet modern deterrence theory emphasizes the importance of this often overlooked educative function of law.[500] The good faith exception will also have more direct effects on police conduct. This section examines three typical situations in which the exclusionary rule currently applies, and in which a good faith exception may produce a different result.

1. Searches and Seizures Conducted Without Probable Cause

Under existing law, probable cause is the basic requirement for most searches and seizures. The fruits of a search or seizure that was illegal because made without probable cause are suppressed. This is the most straightforward kind of suppression case, and perhaps also the most common. Conceivably, a court adopting a good faith exception would decide that because reasonableness is already built into the concept of probable cause, the exception simply does not apply in this case; the court might rule that a "reasonable" belief that probable cause was present, when it was not, is a logical impossibility because probable cause means "reasonable grounds for belief." Thus, to recognize the possibility of a "reasonable mistake" as to probable cause would be to acknowledge the possibility of an officer acting out of a "reasonable unreasonable belief."

The *Williams* decision, however, suggests no such limitation on its holding. Indeed, the court relied on Professor Ball's article, which argued for a weakened exclusionary rule principally in order to dilute the concept of probable cause.[501] Thus, it seems likely, although not inevitable, that the good faith exception will apply in this sort of case.

How, then, will the *Williams* decison affect these searches? The most obvious and baleful consequence will be to retard, if not halt altogether, the development of standards for assessing probable cause. This article has discussed how the courts, in implementing the exclusionary rule, have been able to set tolerably clear lines for the police to observe in determining the presence of probable cause in many recurring factual patterns.[502] Yet it takes close

500. *See generally* F. ZIMRING & G. HAWKINS, *supra* note 138.

501. *See* Ball, *supra* note 311, at 656 (requirements of good faith exception replace requirement of probable cause as determinitive test for admissibility of evidence).

502. *See* notes 185-94 *supra* and accompanying text (discussing District of Columbia Court of Appeals decisions).

cases—those in which a court could say that an officer's conduct was "reasonable" even if it was illegal—for the line to be identified. Consequently, this important law development process will likely come to a halt.

The benefit in protection of fourth amendment values reaped from appellate decisions in cases like those mentioned above would clearly seem to outweigh the social cost of the few prosecutions that were lost. Moreover, even when a court has denied a motion to suppress and held the evidence admissible, the court may have further clarified probable cause standards in the process.[503] Thus, on the balance of values inherent in the probable cause standard, suppression of evidence is entirely justified when police conduct violates the fourth amendment.

It also stands to reason that a police officer will himself be less exacting when making assessments of probable cause if he knows that his conduct will later be measured against a tolerant standard that allows for "reasonable good faith mistakes." The rational officer, after *Williams*, will search in the doubtful case, where before *Williams*, he would likely have stayed his hand. In Professor Ball's view, this is precisely the point. Moreover, the simultaneous weakening of the exclusionary rule's general deterrent impact, and the undermining of its usefulness in the law development process will combine to reduce the rule's potential for preventing fourth amendment violations. As noted above, the officer will be motivated to search in the doubtful case. At the same time, this doubtful case will remain doubtful indefinitely, since the courts will lack the steady flow of cases that require them to sharpen the bounds of permissible police conduct.

2. Warrantless Arrests and Searches

A second sort of fourth amendment violation occurs when the police fail to obtain a warrant when one is required. This article has suggested that the efficiency of the exclusionary rule is potentially great in this situation. If the police know that by failing to obtain a warrant, they will risk suppression of the evidence, they will obtain a warrant in doubtful cases. They will still be able to obtain the evidence they seek, and they can minimize the risk that a judge will later order it suppressed. Consequently, the exclusionary rule serves its purpose, although very little evidence is in fact excluded. Extending the hope that the trial judge will later excuse a failure to obtain the necessary warrant as a "good faith reasonable mistake" can only encourage the police to proceed without a warrant when they are unsure whether they need one or not. Thus, searches will occur in the absence of probable cause, although the magistrate, had he been consulted, could have told the police that they simply could not search, at least without first continuing their investigation by other means. This in turn will increase the number of innocent victims of ultimately fruitless police intrusions. Further, without a steady diet of close cases on the scope of the warrant requirement, the bounds of that standard will remain unclear.

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503. *See* notes 197-200 *supra* and accompanying text (discussing *Dorman v. United States*).

3. Searches Pursuant to an Invalid Warrant

Finally, there are those cases when a defendant seeks to attack a magistrate's finding of probable cause upon which a warrant was issued. Although the *Williams* court expressly reserved the question whether its new rule would apply here, the logic of the decision can leave little doubt that it would be applicable.[504] Indeed, the proponents of legislation enacting a similar limitation on the exclusionary rule have cited this situation as a principal justification for their proposals. Yet the principal concern of the drafters of the fourth amendment was to prohibit issuance of warrants without probable cause.[505] The anomaly of excluding the exclusionary rule in precisely those situations where the fourth amendment violation is clearest seems to have escaped attention. The view that the exclusionary rule is pointless here is tragically short-sighted. Courts rarely suppress evidence by overruling a magistrate's finding of probable cause. There are, for example, no recent decisions from the District of Columbia Court of Appeals, or the United States Court of Appeals for the District of Columbia Circuit, holding a warrant insufficient.[506] The reason surely is an effective system for the issuance of warrants that can, in no small measure, be attributed to the exclusionary rule. The magistrate is surely more careful because he knows that his probable cause determinations may be reviewed on a motion to suppress. Further, he has standards to consult only because the appellate courts have decided enough cases, including some important ones involving review of affidavits in support of warrant applications, to provide guidance. The police, moreover, have less incentive to engage in "magistrate-shopping," in an effort to present their warrant applications to the most lenient magistrate available. At the same time, the exclusionary rule presents the legislature with the incentive to finance a system of professional magistrates, capable of accurate probable cause determinations.[507]

Those few cases where courts have suppressed evidence on the ground that a magistrate issued a warrant in the absence of probable cause have, by and large, served the important purpose of clarifying the law of probable cause. The cases that immediately spring to mind are *Aguilar v. Texas*[508] and *Spinelli v. United States*,[509] which, more than any others, have safeguarded the magis-

504. *See* notes 323-25 *supra* and accompanying text (discussing applicability of *Williams* to cases where officers obtain warrant).

505. *See* note 43 *supra* (discussing intent of drafters of fourth amendment).

506. This article leaves aside those cases in which the affiant has made a knowing or reckless mistatement of a material fact in his warrant application. *See* Franks v. Delaware, 438 U.S. 154, 158 (1978) (affidavit supporting probable cause contained statement of witness never interviewed by police; misstatements not inadvertent, but in bad faith).

507. There is some evidence that in some jurisdictions the police do shop around for lenient magistrates. *See* 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 4.2(e), at 39 (may be reason to be concerned about practice of "magistrate-shopping") (citing L. TIFFANY, D. MCINTYRE & D. ROTTENBERG, DETECTION OF CRIME 120 (1965)). If their decisons were not reviewable by a motion to suppress, those magistrates sympathetic to the police might well become more generous still. Professor Johnson has suggested that in the federal system, at least, the exclusionary rule should not apply when the police have acted pursuant to a warrant. Johnson, New Approaches to Enforcing the Fourth Amendment 8-9 (working paper), *cited in* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.2 (Supp. 1981). It may well be, however, that the federal magistrates perform as well as they do because the exclusionary sanction, although rarely applied, is an ever-present possibility.

508. 378 U.S. 108 (1964).

509. 393 U.S. 410 (1969).

trate's independent role[510] by ruling that warrants issued principally on an affiant's conclusory allegations are insufficient.[511] The Court has insisted that the affiant present sufficient underlying circumstances so that the magistrate can undertake his own assessment of probable cause.[512]

It would, therefore, be particularly wrong-headed to repeal the exclusionary rule in this area, especially since existing doctrine already requires deference to the magistrate's finding of probable cause. It appears that the exclusionary rule, at little actual cost in lost evidence, is the mainspring of an effective warrant issuance system.

This list of typical fourth amendment violations could be extended. Nevertheless, the point should be clear: The good faith exception would significantly undermine a reasonably well-functioning process for protection of fourth amendment rights. Advocates of the exception, by and large, err in considering only the specific deterrent impact of the exclusionary rule. They ignore the other processes by which the exclusionary rule, in several important ways, promotes our right "to be secure in [our] persons, houses, papers, and effects, against unreasonable searches and seizures."

VI. THE GOOD FAITH EXCEPTION AND THE ATTACK ON THE FOURTH AMENDMENT

This article has demonstrated that the good faith exception, although ostensibly directed only at the exclusionary rule, would operate to dilute substantive fourth amendment rights. The *Williams* opinion reveals that this result may be intentional. The court did not condemn the exclusionary rule because it is an ineffective deterrent, but rather because it commands strict compliance with constitutional standards that the court viewed to be incompatible with effective law enforcement.[513] The court made this sentiment clear by quoting Judge Clark's dissent to the panel decision:

510. *See* Aguilar v. Texas, 378 U.S. at 111 (court must insist that magistrate perform neutral and detached function).

511. *See* Spinelli v. United States, 393 U.S. at 416 (no probable cause when affiant offered no support for belief that informant reliable).

512. *See* Aguilar v. Texas, 378 U.S. at 114 (magistrate must be informed of: (1) underlying circumstances indicating personal knowledge of informant, and (2) underlying circumstances indicating reliability of informant).

513. *See* United States v. Williams, 622 F.2d 830, 842 (5th Cir. 1980) (en banc) (second majority opinion) (exclusionary rule directly prevents "whole truth" from being told, thereby freeing guilty criminals and endangering society), *cert. denied*, 449 U.S. 1127 (1981).

The approach of the *Williams* court poignantly calls to mind the contrary perspective adopted by Justice Jackson in his dissent in Harris v. United States, 331 U.S. 145 (1947). Confronted with a case implicating the competing concerns of law enforcement efficiency and the preservation of constitutional safeguards, Justice Jackson wrote:

> [The fourth amendment], like each of our constitutional guaranties [sic], often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught.

Id. at 198 (Jackson, J., dissenting). Justice Jackson, however, was no friend of the exclusionary rule in its application to the states. *See* Irvine v. California, 347 U.S. 128, 136 (1954) (plurality opinion per Jackson, J.) ("[t]hat the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police").

> If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice.[514]

We have thus traveled some distance from where we were a decade ago. At that time, the debate centered on whether the benefit of the exclusionary rule—the deterrence of police illegality—justified its costs to society—the suppression of evidence and the consequent loss of convictions. Critics of the rule urged its abrogation because it had little evident effect on police behavior.[515] Now, critics demand elimination of the rule precisely because it has succeeded in restraining unlawful police conduct.[516]

Chief Justice Burger's evolving position on the exclusionary rule traces this shift in criticism. In his 1971 dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[517] his first salvo against the rule while sitting on the Supreme Court, the Chief Justice questioned whether the exclusionary rule actually deterred police misconduct. He acknowledged the need to ensure "official observance of the law,"[518] but insisted that "[s]ome clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals."[519] Such a demonstration, he argued, had not been made.[520] Even so, Burger did not call for jettisoning the rule all at once. He feared that eliminating the exclusionary rule, without an effective tort remedy to replace it, would engender "the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared."[521] Accordingly, he urged Congress to create tort remedies directly against the government and to overrule the exclusionary rule through legislation.[522]

Six years later, in the absence of any legislative response to his invitation,

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514. United States v. Williams, 622 F.2d 830, 842 (1980) (en banc) (second majority opinion) (quoting United States v. Williams, 594 F.2d 86, 97-98 (5th Cir. 1979) (Clark, J., dissenting)), *cert. denied*, 449 U.S. 1127 (1981). In a portion of his opinion that the en banc court did not quote, Clark is even more candid on this point: "Officer Markonni did what any reasonable, practical officer would have considered the law required him to do. He did what reasonable, practical citizens would expect him to do." 594 F.2d at 97. Thus, Judge Clark apparently endorses Agent Markonni's action, even on the assumption that it violated the defendant's fourth amendment rights. *Id.*

515. *See* note 103 *supra* (citing studies on effectiveness of exclusionary rule as a deterrent).

516. *See* United States v. Williams, 594 F.2d 86, 97-98 (1979) (Clark, J., dissenting) (exclusion of evidence deters officers from acting when criminal activity observed), *rev'd*, 622 F.2d 830 (1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

517. 403 U.S. 388 (1971). The majority in *Bivens* ruled that there was an implied a private cause of action under the fourth amendment, and allowed the plaintiff to seek damages against federal agents who performed a warrantless search without probable cause. *Id.* at 397. Chief Justice Burger dissented, arguing that creation of a damage remedy is a legislative act properly exercised only by Congress. *Id.* at 411-12 (Burger, C.J., dissenting).

518. *Id.* at 414 (Burger, C.J., dissenting).

519. *Id.* at 416.

520. *Id.* at 416. Burger noted that no empirical evidence had been produced that would show that the exclusionary rule actually deterred illegal conduct of law enforcement officials. *Id.* (citing Oaks, *supra* note 103, at 667).

521. *Id.* at 420-21.

522. *Id.* at 422-23. Not surprisingly, a deafening silence followed.

Chief Justice Burger took a new tack. In his concurrence in *Stone v. Powell*,[523] he abandoned his *Bivens* argument for an effective tort remedy coupled with the simultaneous abolition of the exclusionary rule. Instead, he claimed that the exclusionary rule itself inhibited the development of alternative means of enforcement. The Chief Justice maintained that "[l]egislatures are unlikely to create statutory alternatives, or impose direct sanctions on errant police officers or on the public treasury by way of tort actions so long as persons who commit serious crimes continue to reap the enormous and undeserved benefits of the exclusionary rule."[524] Accordingly, Chief Justice Burger called for the Court either to overrule the exclusionary rule immediately, even in the absence of an alternative remedy, or to limit its scope to egregious, bad faith conduct.[525] Only then, he predicted, would Congress enact a statutory remedy for persons injured by police "mistakes or misconduct."[526]

Lately, the Chief Justice seems more troubled by the standards of the fourth amendment itself than by the practical effectiveness of the exclusionary rule; now he criticizes the rule for its ability to induce police compliance with standards that he deems too restrictive. In *Ybarra v. Illinois*,[527] he dissented from the majority's holding that police, when they arrive to execute a warrant to search a third person, may not search bystanders without probable cause.[528] Burger argued that the exclusionary rule should not have been applied because the police had reasonable suspicion to search the bystander.[529] Yet he couched his criticism as a further attack on the exclusionary rule. He claimed that "[t]he Court's holding is but another manifestation of the practical poverty of the judge-made exclusionary rule . . . [and] operates as but a further hindrance on the already difficult effort to police drug traffic."[530] Thus, the Chief Justice seems to recognize that application of the exclusionary rule will compel other police officers to conform to the substantive fourth amendment standards that the majority announced, and he counts this deterrent impact among the rule's costs.

Judge Malcolm Wilkey, of the United States Court of Appeals for the District of Columbia Circuit, has similarly assailed fourth amendment standards through an attack on the exclusionary rule.[531] In an article he wrote to cham-

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523. 428 U.S. 465 (1976). The majority held that when the defendant has had a full and fair opportunity to litigate his fourth amendment claim in state proceedings, federal habeas corpus review will be denied. *Id.* at 494. The court reasoned that the incremental deterrence to state police that federal habeas corpus relief would provide is not worth the cost to society in suppressing probative evidence and "free[ing] the guilty." *Id.* at 490, 495.

524. *Id.* at 500-01 (Burger, C.J., concurring). Another interpretation of these events leads to a more plausible prediction: if the legislatures are unwilling to enact a tort remedy with some teeth despite the incentive that the exclusionary rule might then be abrogated, then it is more unlikely still that we will see such legislation if that incentive is removed.

525. *Id.* at 501.

526. *Id.*

527. 444 U.S. 85 (1979).

528. *Id.* at 90, 96.

529. *Id.* at 97-98 (Burger, C.J., with Blackmun & Rehnquist, JJ., dissenting).

530. *Id.* at 97.

531. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 230-31 (1978) (arguing for statutory alternative to exclusionary rule based upon internal discipline by police and external control by courts or review board). This is one of a four-article exchange with Professor Yale Kamisar. The other articles are: Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing,"* 62 JUDICATURE 337 (1979); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amend-*

pion the abolition of the rule, Judge Wilkey charged that, among other things, it impedes gun control by hampering the ability of police to conduct searches on the street:

> No matter how rigid the gun control law, no matter how illegal the possession . . . if the officer does not have what the American law calls "probable cause" to make a reasonable search under the Fourth Amendment, if he goes ahead and makes the search, finds and confiscates the weapon, the evidence of that search and that weapon cannot be introduced as evidence at trial. The result is, of course, that the man *cannot* be convicted of carrying a weapon illegally . . . .
>
> Since criminals know the difficulties of the police in making a valid search which will stand up under challenge at trial, a further result is apparent—the criminals in America *do* carry guns.[532]

In effect, Wilkey blames the exclusionary rule for preventing searches based on less than probable cause.[533] As noted by Professor Yale Kamisar, Wilkey's

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ment?, 62 JUDICATURE 66 (1978); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979).

532. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 224-25 (1978) (emphasis in original). If criminals are insufficiently deterred from carrying guns, it surely must be because they do not believe that their weapons are likely to discovered. Judge Wilkey's suggestion that criminals will carry weapons, knowing that they might be seized, but calculating that a suppression motion will later be granted, seems simply unrealistic.

533. At one time, Wilkey proposed that instead of suppressing unlawfully-seized evidence, the trial court should conduct a "mini-trial" at the conclusion of the criminal trial. At this "mini-trial," the factfinder would determine whether the police officer had violated the fourth amendment and, if so, impose a disciplinary penalty and award compensation to the injured party. *Id.* at 231. Whether Wilkey is sincere in wanting to deter violations of the fourth amendment with an alternative remedy is questionable for two reasons. First, Wilkey's professed support for an effective tort remedy is inconsistent with his endorsement of police searches "on the slightest suspicion." If such an alternative remedy worked, police would have great incentive to observe the probable cause standard to avoid personal liability. *See* notes 215-16 *supra* and accompanying text. Thus, the increase in on-the-street searches that Wilkey has called for would not occur. Second, Wilkey's proposal fails to take into account that juries are unlikely to return verdicts against individual police officers. After making such an observation, Chief Justice Burger proposed that an administrative tribunal might be better suited to hear claims against police officers. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting). A tort remedy would only deter police officers if damages were actually recovered for police misconduct.

Judge Wilkey may now have abandoned his mini-trial proposal. In his dissent in United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981) (en banc), *cert. granted*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981), Wilkey expressed what he saw as another defect of the exclusionary rule: it "diverts resources allocated to the criminal justice system from the trial of criminals to the trial of the police." *Id.* at 1205 (Wilkey, J., dissenting) (footnote omitted). The mini-trial would result in precisely the same diversion, but after the defendant's guilt or innocence was ascertained, rather than before.

Wilkey cites a report prepared by the United States Comptroller General reporting that "[A]bout one third of federal defendants going to trial file Fourth Amendment suppression motions; most of these have formal hearings on these motions." *Id.* at 1205 n.154 (citing COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. No. GGD-79-45 (April 19, 1979) [hereinafter EXCLUSIONARY RULE REPORT]).

But Wilkey misuses his source. The thrust of the report is that the drain of judicial resources is modest indeed. According to the United States Attorneys' offices throughout the country that were surveyed, 29.8% of criminal cases going to trial involved a search or seizure. In only 10.5% of criminal cases going to trial, about one-third of all cases where a search or seizure occurred, was a suppression motion even filed. EXCLUSIONARY RULE REPORT, *supra*, at 9. Thus Wilkey makes a three-fold overstatement of the number of motions filed. Furthermore, in some significant percentage of cases where a motion is filed, no hearing is held. *Id.* at 10. The report also showed that only 1.3% of the prosecutors' time was spent on fourth amendment motions (although the figure is necessarily inexact). *Id.* at 12. On the question of the defendants' benefitting from the exclusionary rule, the report concluded that in a

criticism is "really an attack on the constitutional guaranty, not the exclusionary rule."[534]

Wilkey further laments fourth amendment restrictions on police conduct when he speaks covetously of the *in terrorem* effect in foreign jurisdictions where police can search virtually at will:[535] "The rule in other countries produces another salutary result: there is no widespread searching by the police. It is not necessary, so long as the police have *power* to do it, with resulting automatic conviction—and the criminals *know* the police have such power."[536] Despite Judge Wilkey's protestations to the contrary,[537] this is an attack on the limits that the fourth amendment places on the police, rather than on the doctrine that requires suppression of evidence when the police exceed those limits.

The recent criticism of the exclusionary rule that Burger and Wilkey have voiced, and which *Williams* in its own way exemplifies, is not new. The sub-

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mere 1.3% of the cases studied "was evidence excluded as a result of filing a fourth amendment motion." *Id.* at 11. The number acquitted as a result, although not susceptible to precise calculation, must have been fewer still. *See id.* at 13 (no certain way to determine whether inadmissibility of excluded evidence proximate cause of acquital). Furthermore, in only 0.4% of the cases in which the prosecutors declined to file charges were search or seizure problems the primary reason. *Id.* at 14. This data would seem to suggest that the costs to society of the exclusionary rule in terms of freeing the guilty would be cancelled out by about a 1% increase in the efficiency of federal law enforcement agencies.

534. Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing"*, 62 JUDICATURE 337, 343 (1979) (assailing Wilkey's argument that guns produced by search or frisk should be valid evidence).

535. Critics of the exclusionary rule often make much of the fact that the United States is one of very few countries in the world with such a rule. *See* California v. Minjares, 443 U.S. 916, 919 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) ("I feel morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence . . . is mechanically excluded"); Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) (no exclusionary rule in England or Canada, whose courts are otherwise "models of judicial decorum and fairness") (quoting Oaks, *supra* note 103, a 669); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (exclusionary rule is "unique to American jurisprudence").

There are, however, many reasons why an exclusionary rule is called for here, though not in other common law countries. *See* Saltzburg, *supra* note 44, at 193 n.299 (that other countries have not adopted rule "of no significance" for United States; rule necessary here because of unique protections of fourth amendment). The United States has a more heterogeneous population than most developed countries, which may well lessen citizen identification with the minority groups whose privacy is most likely to be invaded by the police; it has an atavistic frontier tradition that encourages public lawlessness, and it lacks a tradition of control of the police by the central government; a vastly disproportionate number of illegal arrests and searches involve suspects of victimless crimes, and our peculiarly moralistic and puritanical system of criminal law is replete with such crimes; and, finally, Americans may be less willing than citizens of other countries to enforce constitutional privacy guarantees through the political process. Kaplan, *supra* note 131, at 1031.

"Two conclusions should stand without debate," Professor Baade has written:

> First, deliberate illegality as a matter of policy, at least as a large-scale phenomenon, is peculiarly American. Second, in the American milieu, the hallowed remedies of criminal or civil liability, internal discipline, and reproof from the bench have proved to be illusory. These conclusions help explain the reluctance of other common law countries to follow American authority on illegally obtained evidence. They also reveal the logic behind the American exclusionary rule: without the rule the public has no sanction whatever against police illegality.

Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, 51 TEX. L. REV. 1325, 1349 (1973).

536. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 225 (1978) (emphasis in original).

537. *See* Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351, 353-54 (1979) (discussing distinction between restrictions created by fourth amendment and by exclusionary rule).

stantive requirements of the fourth amendment have previously been the real target of barbs ostensibly aimed only at the exclusionary rule. When *Mapp* extended the exclusionary rule to the states, New York City Police Commissioner Murphy complained that his police department now had to revamp its training programs from top-to-bottom.[538] Before *Mapp*, violations of the fourth amendment were of little moment in New York because illegally-seized evidence was admissible under *People v. Defore*.[539] As Commissioner Murphy observed:

> I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this . . . . I was immediately caught up in the entire program of reevaluating our procedures which had followed the *Defore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp* . . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen . . . .[540]

Of course, *Mapp* created no new doctrine for the police to "implement." It simply meant, for the first time, that violations of rules that had in theory applied to the police all along would lead to unpleasant consequences. Commissioner Murphy's comments suggest, however, that it was not until the exclusionary rule was applied in New York that the police paid any heed to the fourth amendment.

Examining the views of both Chief Justice Burger and Judge Wilkey suggests that it is important to recognize when criticism of the exclusionary rule is really an attack on the fourth amendment. The exclusionary rule has done nothing to change the powers of the police or the rights of the citizenry. The fourth amendment sets these standards. The exclusionary rule simply declares that evidence obtained in violation of these rights is not admissible at trial.

CONCLUSION

This article has demonstrated how the good faith exception will stifle the development of fourth amendment law by whatever courts adopt it. Slowing the law development process will of itself lead to countless fourth amendment violations that might otherwise have been prevented. Furthermore, in the

538. *See* Kamisar, *supra* note 40, at 72 (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966)). *See generally*, Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORN. L. REV. 436 (1964). Professor Kamisar reported that when the exclusionary rule was adopted in California in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), the Chief of Police of Los Angeles seemed to think that limitations on searches and seizures had just been invented: "The actual commission of a serious criminal offense will not justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute 'probable cause.' " Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORN. L. REV. at 441 (quoting Parker, *The Cahan Decision Made Life Easier for the Criminal*, in X. PARKER, POLICE 117 (Wilson ed. 1957)). "As long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule." *Id.* (quoting Parker, *The March of Crime*, in X. PARKER, POLICE 131 (Wilson ed. 1957)).

539. 242 N.Y. 13, 150 N.E. 585 (1926); *see* note 5 *supra*.

540. Kamisar, *supra* note 40, at 72 (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966)).

hands of a trial judge who lacks enthusiasm for suppressing probative evidence, the exception will provide a ready means to admit the evidence with little risk of reversal on appeal. Ultimately, and despite the *Williams* court's contrary protestations, adoption of the good faith exception could forever alter the substantive content of the fourth amendment. It is easy to forget that we knew neither what the amendment meant nor what standards it set for law enforcement, until courts set out to give it content in the course of deciding when evidence should or should not be suppressed. With the *Williams* good faith exception in effect, the lines that have been developed through years of fourth amendment jurisprudence will soon blur. Courts will admit evidence when the police have probable cause, or "something close to it," or when it was "reasonable" to dispense with a warrant, whether or not "technically" permissible. The only question that courts will answer will come close to being whether, in a given case, what the police did was "generally reasonable." Even if the more particular standards that the fourth amendment now sets continue to exist in some way, the reasonableness question will be the only one worth answering, because only that answer will carry any consequence.

If we do not place much value on the goal of regulating the police in an effort to prevent violations of individual privacy, such an inquiry may have its virtues. In that case, however, we should debate the reasonableness standard on its merits. It is unfortunate that the good faith exception may prove to be something of a Trojan horse; in the guise of softening a sometimes harsh remedy for violations of fourth amendment rights, it may permanently alter the definition of those rights. If that is what we want, then perhaps it is what we deserve. But let us recognize what we are getting.

Mr. CONYERS. Our next witness is Ms. Sue Marie Johnson, deputy director of the Police Executive Research Forum, an organization of top law enforcement personnel in the country devoted to the development of greater expertise in the Nation's police departments. She has prepared a written statement that we will incorporate into the record. We welcome you before the subcommittee.

TESTIMONY OF SUE MARIE JOHNSON, DEPUTY DIRECTOR, POLICE EXECUTIVE RESEARCH FORUM

Ms. JOHNSON. Thank you, Mr. Chairman. The members of the Police Executive Research Forum appreciate this opportunity to express our views on the exclusionary rule and our proposal for an alternative to it.

Mr. Chairman, the forum members are disillusioned with how the exclusionary rule now operates in criminal proceedings. Still, we do not think that the current proposals to modify the rule offer the best means of achieving its primary objective, which is to deter unconstitutional police conduct. Whether the current operation of the exclusionary rule achieves this deterrent objective in a satisfactory manner is presently open to question.

What the forum would like to suggest is a method which truly assists us in meeting this objective while eliminating some of the problems surrounding the exclusionary rule. The best way to realize that goal is to place the responsibility for deterring constitutional violations with those who can most effectively carry it out: Police administrators.

In applying the exclusionary rule against individual officers, the judiciary can only have an indirect effect on officer behavior. In contrast, police administrators, through internal regulatory programs of rulemaking, training and discipline, can directly control officer violations.

What the Forum recommends is that the exclusionary rule be used to place this responsibility with police administrators. Our substitute process redirects the focus of the exclusionary rule sanction from individual officers to police departments. The rule would be applied against departments which failed to assume their responsibility for deterring misconduct. The sanctions of individual officers would come from a much more effective source than the judiciary, it would come from the disciplinary actions of their superiors.

Under our process, the test for applying the exclusionary rule is whether police departments have accepted their responsibility for deterrence so that constitutional violations will be effectively minimized. If police departments institute rules, training and discipline to deter constitutional violations, and the judge finds these efforts satisfactory, the courts would not impose the exclusionary rule and evidence would then be used in trials. However, if police administrators cannot demonstate they have fulfilled this responsibility, the exclusionary rule would then continue to be applied.

The opportunity to avoid the use of the exclusionary rule will provide an incentive for police administrators to institute these deterrent measures. Currently, there is a disincentive for issuing internal regulations that guide officers in the complex area of consti-

tutional requirements. Administrators fear that such rules will be used against them in suppression hearings. But if police administrators knew that issuing guidelines were keyed to the court's consideration to forego of the exclusionary rule, they would have the necessary incentive to issue these rules and to enforce them.

Having assumed their responsibility, constitutional violations would be minimized for all areas of law enforcement activities, not just those activities which involve evidentiary matters that come to the attention of the judiciary.

To reiterate the basic concept of our proposal, use of the exclusionary rule would be dependent upon performance of the police department. A department could demonstrate it had taken its responsibilities seriously by meeting three requirements: by publishing departmental rules on proper constitutional procedures; instituting effective training programs; and maintaining a history of disciplinary actions taken against officers who commit violations.

Each of the components of our proposal are interwoven and complementary to each other. Implementation of one alone will not provide either an adequate substitute for the exclusionary rule or relief from the problems surrounding its use. The development of clear, precise departmental rules to guide officers will provide a method of spelling out the meaning of constitutional requirements in a manner which is understandable to police officers. Effective training programs will reinforce and clarify this guidance. Finally, a comprehensive system of internal discipline will promote observance of the rules.

It is important to emphasize that with our proposed substitute we are not advocating elimination of the exclusionary rule. On the contrary, the exclusionary rule is an integral part of our process. The prospect that it will not be applied acts as an incentive for police departments to assume the responsibility which they can fulfill better than the courts, the control of their own officers' conduct. When they have proven they can do this, the rule will simply fall into disuse.

None of the proposed modifications address what we believe is the most important consideration for devising a remedy for constitutional violations, and that is the assumption of responsibility by law enforcement executives for the violations of their officers. This will be the only means by which we can effectively make sure that violations are minimized. What is needed is a mechanism to test not the subjective factor of good-faith on the part of individual officers in particular cases, but the objective measurable factor of good faith efforts on the part of department administrators.

Thank you.

Mr. McCollum [presiding]. Thank you.

We were just trying to debate for a moment whether this is a recorded quorum call on the floor. We are going to have to break for a vote very shortly, in any event.

I would like to ask you a question specifically about how you would have the particular procedures implemented that you are suggesting. Would you have them implemented by Federal legislation, by our body enacting statutory provisions? How would you envision them actually being implemented?

Ms. JOHNSON. My testifying today is in the context of Federal law enforcement, such as the FBI or the DEA. Very often, Federal legislation acts as a model for State legislation, so that if you did enact legislation providing for this procedure for Federal law enforcement, the chances that it would then be implemented by the States would probably be very great.

Mr. MCCOLLUM. So, are you suggesting that we pass legislation that provides for an experimental limited alternative to the exclusionary rule, or would you have it all over the country? Would the court have the power at some point to step in and decide that it wasn't being done properly? How are we going to get from point A to point C?

Ms. JOHNSON. The advantage of our proposal is that the exclusionary rule remains intact——

Mr. MCCOLLUM. I understand that.

Ms. JOHNSON [continuing]. Until it is proved the departments can live up to their responsibility—or the FBI in this instance.

The courts would always be stepping in because each time there was a motion to suppress evidence, the court would first look to see whether or not the officer acted in violation of the fourth amendment. If the court found that he did violate the fourth amendment, the court would then look to the department to see if it had a rule on the procedure, such as use of a search warrant. If the department didn't have a rule on that procedure, then the court would exclude the evidence, because the department had failed to live up to its responsibility.

But if the department did have a rule on that particular instance in question, the court would then look to see if the department had a history of disciplining its officers for violating its rules. If it did, then the court could be assured that this officer would be disciplined, and then the court would let the evidence in.

In this way, the officer would personally feel the sanction of being disciplined by his superiors, more so than he does now. Under the exclusionary rule, even if he does hear that evidence is excluded in a case in which he was involved, he very rarely hears or understands the reasons why it was excluded.

Mr. MCCOLLUM. But if the court initially finds that there is no such police procedure, he wouldn't necessarily exclude the evidence.

Ms. JOHNSON. That is correct. What the court would do is look to see if it was reasonable that the department did not have a rule in this particular instance. Let's say it is an issue that never came up before in any other jurisdiction or in any court and it was just something that the department couldn't foresee; then, because the department had a history of implementing rules, the court would be assured that the department would then go back and implement a rule on this particular procedure, and it would let the evidence in in that particular case.

Mr. MCCOLLUM. I think I understand what you are suggesting.

Do you have any comments that you would like to make with regard to the issue of a good faith exception of the exclusionary rule? Obviously, your proposal would not encompass any changes in the exclusionary rule. But do you have, or does the Forum have, an opinion about modifying the exclusionary rule?

Ms. JOHNSON. We really do not believe that modifying it according to good faith is the proper way to go about it. We think that such a solution avoids the real issue of controlling police conduct. What the good faith modification does is put a premium on officer ignorance, and, more significantly, on ignorance of the department which trains them. What it does is increase the disincentive for departments to implement rules, training, and discipline of their officers for violations.

What is needed, instead, is an objective test where you can measure the amount of the internal regulation by a department and provide incentive for them to do so.

Mr. MCCOLLUM. I really don't have any further questions to explore with you on this issue. I think that we have pretty well exhausted it. You made a good presentation. It is a novel one, as far as I am concerned, and I think the subcommittee should examine it and explore it.

We do have a vote coming up very shortly on the floor. At this point in time, I will excuse you as a witness and, before calling the next one, I will take a recess. The subcommittee will be in recess until the voting issue is resolved.

Ms. JOHNSON. Thank you very much.

[Recess.]

[The complete statement of Ms. Johnson follows:]

STATEMENT OF SUE MARIE JOHNSON, DEPUTY DIRECTOR, POLICE EXECUTIVE RESEARCH FORUM

Mr. Chairman, thank you for providing to the members of the Police Executive Research Forum this opportunity to express our views on the exclusionary rule and certain proposed alternatives to it. The Forum is an organization of police chief executives from the nation's larger jurisdictions. Our goal is to improve the delivery of police service by promoting and bringing about the further professionalization of police executives and officers. We conduct research, engage in experimentation and provide a forum for debate on a wide range of criminal justice issues. It is our belief that, from these efforts, substantial improvement in the quality of law enforcement services will result.

Recently, several alternatives to the exclusionary rule have been proposed in response to dissatisfaction with the effects of the exclusionary rule. We in local law enforcement confront the effects of the exclusionary rule continually; how the rule now operates in criminal proceedings disillusions us. Still, we do not think that the alternatives suggested by critics of the exclusionary rule offer the best means of remedying the ill-effects of the rule, or of achieving the rule's primary objective: to deter unconstitutional police conduct.

What we would like to recommend is a substitute process, one that will not only serve the purposes of the rule but will also broadly influence the improvement of policing. We envision a process by which the responsiblity for deterring police violations of citizens' constitutional rights is given to police administrators; they can carry such responsibility most effectively; the judiciary can deter police violations only indirectly. The change in focus of the judicial sanction, from individual officers or their department, will provide to police agencies the necessary incentive to institute programs for effectively deterring constitutional violations by their officers; that is because, if such programs are not implemented, the exclusionary rule will continue to be applied. If police administrators show that they can carry this responsibility, that they can execute it diligently, then the need to apply the exclusionary rule in individual cases will disappear, constitutional rights will be protected, reliable and relevant evidence will be used in trials, and the effectiveness of our criminal justice system will be enhanced.

Adopting our proposal to redirect responsibility for deterring police violations of constitutional rights from the judiciary to the police is risk free. In respect of those who believe that, to ensure true justice in criminal proceedings, the exclusionary rule must be eliminated or curtailed, our proposal provides satisfaction; it is limited only by the potential of police administrators to protect individuals' constitutional

rights. Regarding those who believe that the elimination or curtailment of the exclusionary rule means more police violations of individuals' constitutional rights, our proposal guarantees that the exclusionary rule will be applied whenever the judiciary determines that police departments are not ensuring that individuals' constitutional rights will not be violated. Our proposal guarantees that both agendas in the exclusionary rule debate will be accomplished. Each of the other proposed alternatives to the exclusionary rule forces an either-or choice: you are either for the exclusionary rule, or you are against it. Our proposal is better than the other alternatives, not only because it supports, at once, the interests expressed in both of these positions, but also because it more realistically provides for achievement of the judiciary's objectives in applying the exclusionary rule.

OBJECTIVES OF THE EXCLUSIONARY RULE AND PROBLEMS RELATED TO ITS APPLICATION

The exclusionary rule was first enunciated in the 1914 Supreme Court decision, *Weeks* v. *United States,* 232 U.S. 383 (1914). The rule was devised as a remedy for violations of citizens' constitutional rights secured by the Fourth Amendment.

Initially, the Court held that this remedy applied only in federal prosecutions. *Wolf* v. *Colorado,* 338 U.S. 25 (1949). The Court left the states free to experiment with alternative sanctions for constitutional violations by law enforcement officers. Unfortunately, state and local officials, including those in law enforcement, did not heed the Court's warnings and failed to develop remedies that would secure compliance with the Fourth Amendment's provisions. The consequence of their inaction was the Supreme Court's 1961 decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), to extend the exclusionary rule remedy to state courts.

The rule's objective

The essence of the exclusionary rule is that evidence obtained in violation of Fourth Amendment requirements cannot be used against defendants in criminal proceedings. In *Weeks* and subsequent opinions, the Supreme Court offered a number of rationales for applying the rule, the major ones being, first, to maintain judicial integrity by removing the judiciary from the taint of partnership in unlawful behavior of law enforcement officers and, second, to deter future violations by prohibiting law enforcement officers from profiting by their lawless behavior. See, *Weeks* at 392 and *Mapp* at 648, 652, and 659–60.

Throughout the history of the exclusionary rule, the Court extended the rule's application beyond Fourth Amendment search and seizure violations to violations of the Fifth Amendment [*United States* v. *Ade,* 388 U.S. 218 (1967)], the Sixth Amendment [*Miranda* v. *Arizona,* 384 U.S. 436 (1966)] and the Fourteenth Amendment [*Irvine* v. *California,* 347 U.S. 128 (1954)]. While the sanction was being extended, however, the judicial integrity argument lost its force as an independent justification. Today, the deterrence rationale is the predominant consideration in courts' decisions regarding suppression motions; judicial integrity is a consideration that is secondary to courts' assessments of whether or not the sanction will deter future violations. See, *Stone* v. *Powell,* 428 U.S. 465, 486 (1976); *United States* v. *Calandra,* 414 U.S. 338, 348 (1974); *United States* v. *Janis,* 428 U.S. 423, 458–59 n.35 (1976); *Dunaway* v. *New York,* 442 U.S. 200, 218 (1979).

We believe that the deterrence rationale no longer provides a reasonable justification for the rule as the rule is currently applied. Though deterrence of unconstitutional police conduct is a goal we all seek to achieve, the exclusionary rule, by itself, does not constitute an appropriate means of achieving this goal.

By our criticism we are not suggesting that the rule has failed to assist in improving our system of justice. Two major benefits of the rule's application can be identified. The first benefit is that the rule has provided to defendants an incentive to challenge the propriety of conduct of law enforcement personel; this has led to the judiciary's focusing on the requirements of constitutional behavior as these affect police. The second benefit is constituted by the indirect, long-range effects that these judicial rulings have had on police behavior; the educational aspect of decisions that have identified certain actions as improper have led police administrators to pay more particular attention to the requirements for constitutional procedure and, as a consequence, training of police officers has improved. Whether or not these two major benefits could have been realized without the rule, or under a different sanction, will never be known. Notwithstanding the benefits, the current level of dissatisfaction with the rule and the problems it presents require us to heed now the Court's warnings and find new ways to serve the purpose of the rule.

Ascertaining a means of measuring the deterrent effect of the rule as the rule is currently applied has proven elusive; this condition has intensified debate about the

point at which a balance, if any, can be struck between the benefits of the deterrent effect and the costs to the criminal justice system and society. See Oaks, "Studying the Exclusionary Rule in Search and Seizure," 27 University of Chicago Law Review 665 (1970); Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 Journal of Legal Studies 243 (1973), Canon, "Is the Exclusionary Rule Failing Health? Some New Data and a Plea Against a Precipitous Conclusion." 62 Kentucky Law Journal 681 (1974); Comptroller General of the United States, "Impact of the Exclusionary Rule in Federal Criminal Prosecution," Report Number GGD–79–45 (19 April 1979). Instead of further debating such issues, we want here to share our expertise as law enforcement administrators in the process of developing a suitable alternative to the rule. Abolishing the rule without substituting an effective mechanism for it amounts to a mere experiment, one in which we are not willing to engage. It is clear, however, that something must be done; the courts cannot do it themselves. We believe it is incumbent upon the law enforcement community to work with the judiciary and the legislatures to devise a suitable alternative.

Disadvantages of the rule

Apart from doubts about whether or not the rule has achieved its objective of deterrence, use of the rule has led to several problems, some of which are more burdensome than those that the rule was originally intended to remedy. From the many problems discussed by commentators, we have deducted seven major arguments.

In the first line of argument it is posited that the exclusionary rule interferes with justice by distorting the truth. Reliable, relevant evidence that would be admitted if obtained legally is excluded from the fact-finding process when obtained in violation of constitutional commands.

A second line of argument stresses that endlessly litigating the validity of searches, seizures and other law enforcement procedures causes delays in the trial process and diverts attention from questions of guilt and innocence; focus shifts from alleged wrongdoings of defendants to allegations about police, vitiating attempts to provide swift and certain punishment for criminal activity.

A third contention is grounded in the following perception: respect that law enforcement personnel and citizens have for the law and our criminal justice system is destroyed by the rule. Instead of operating as a deterrent, the rule encourages some police officers to twist facts and stretch the truth about searches; there is the spectacle, too, of the guilty going free because of technical errors.

A fourth line of argument is based on assertions that the rule protects only those who face criminal prosecution, and that the rule cannot deter violations of constitutionally guaranteed rights when the police have either no interest in prosecuting or are willing to forego successful prosecution in the interest of pursuing other goals.

In the fifth line of argument it is charged that the rule fails to discriminate degrees of misconduct by police officers and degrees of harm done to victims of such conduct; regarding punishments, no rational distinctions are made between minor offenses and serious crimes or between honest mistakes and deliberate, flagrant violations.

A sixth argument is that the rule discourages internal rule-making and inhibits disciplining of errant police officers because there is fear that the very fact of punishment being administered because of rule violations can itself be used as evidence to bolster defendants' cases for suppressing evidence obtained by illegal methods.

In a seventh line of argument it is submitted that the exclusionary rule adds to the confusion about Fourth Amendment standards for reasonable searches and seizures. Trial court judges often tortuously construe the definitions of the Fourth Amendment so they can find that searches and seizures were reasonable and avoid the harsh requirement of excluding evidence. This gives rise to minute and often bizarre gradations in legal and illegal conduct, eliminating incentives to improve police procedures: incentives that could be provided by pointing out errors and penalizing officers.

THE FORUM'S ALTERNATIVE TO THE EXCLUSIONARY RULE

If an alternative to the exclusionary rule is to be acceptable, it must meet two objectives. First, it must operate as a deterrent to police misbehavior by providing a clear and understandable guide to proper conduct under the Constitution and by further providing incentive to take immediate disciplinary actions in response to violations. Second, it must remove those obstacles created by the exclusionary rule,

which obstacles now prevent the guilty from being convicted, so that evidence of guilt can be used in trials.

Though deterrence of unconstitutional police conduct is the main rationale for the exclusionary rule, the effectiveness of the rule, as it currently operates, in achieving the goal of deterrence is in serious question. The apparent lack of deterrence results, in plain terms, from a lack of communication: the courts, in their rulings on motions to suppress, fail to communicate to police departments the specific requirements of the Fourth Amendment, and the police fail to educate the courts to the realities of law enforcement practices. Much of this owes to the fact that the exclusionary rule sanction is directed against individual officers.

Effective communication between the courts and the police is vital to making most productive our efforts to preserve constitutional rights. Abolition of the rule, or a good faith exception to it, will not solve the problem of poor communication. A process must be devised to ensure that police awareness of constitutional restrictions and of the necessity of operating within those restrictions is increased. We believe that directing the judicial sanction of exclusion away from individual police officers to police administrators will accomplish that objective.

As law enforcement executives, we know best how to deter our officers from improper conduct. In areas of officer misconduct other than constitutional violations—one such area being the unauthorized use of deadly force—experience tells us that improper behavior can be curbed by putting to use three tools in combination: rulemaking, training, and discipline. For example: in his study of shootings by officers from the New York City Police Department, Professor James Fyfe found that significant reductions in the amount of police use of deadly force were associated with the combined implementation of clear rules which guide officers in the use of force and of procedures to strictly enforce the rules. [See, Fyfe, "Administrative Interventions on Police Shooting Discretion: An Empirical Examination," 7 Journal of Criminal Justice, 309 (1979).] Currently, however, some police administrators fail to develop precise rules regarding Fourth Amendment procedures and fail to discipline officers for constitutional violations because they fear that such actions will be used against them in suppression hearings: the exclusionary rule as it is currently applied creates for police administrators a disincentive to accept responsibility for deterring constitutional violations.

What is needed is a process that eliminates disincentive and, simultaneously, provides to police administrators incentive to accept responsibility for deterring misconduct regarding Fourth Amendment procedures.

The process by which we propose to meet these needs, especially the need to provide incentive, is one in which application of the exclusionary rule would be dependent upon the performance of police departments themselves. The concept is that the exclusionary rule would not be applied if the police department in question had taken seriously its responsibility to adhere to Fourth Amendment procedures. Departments could demonstrate proof of such good faith by meeting the following three requirements: (1) Publishing departmental rules and regulations that guide police on proper constitutional procedures; (2) instituting effective programs to train officers according to these rules and rgulations; and (3) maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules.

The procedure by which this alternative would be implemented is as follows:

1. The judge would rule on whether or not the officer had committed a constitutional violation.

2. If the judge rules, yes, the prosecutor could then undertake to have the evidence admitted according the following procedure: the prosecutor would ask the judge to review the police department's regulations, training programs and disciplinary history.

3. The prosecutor would have the burden of proving that the police met the three requirements (mentioned above) in a manner sufficient to ensure—that the failure to provide a rule was reasonable, and that regulations specifying, and training in, the proper methods for proceeding in the particular circumstances under review would be immediately forthcoming; or that, if the department already had a rule covering the circumstance, the officer would be disciplined for violating the rule unless the officer was acting reasonably and in good faith; or that, if the departmental rule was found to be unconstitutional, it was promulgated in good faith, appeared reasonable before it was applied to the particular facts under review, and would be reissued in proper form.

Should the prosecutor fail in an attempt to prove that the department met the above conditions, the judge would exclude the evidence. [See, Kaplan, "The Limits of

the Exclusionary Rule," 26 Standard Law Review, 1027, 1050–52 (1974) for a similar proposal.]

We believe that rulemaking, training and discipline constitute the most appropriate means for deterring Fourth Amendment violations, and that the emphasis we place on such means is well founded. To justify to you our reliance, I would like to spend a few moments discussing the effectiveness of each of these three components.

Rules and regulations

The exclusionary rule, insofar as it was justified as a deterrent to police misconduct, was designed to ensure police conformance with constitutional requirements. In some agencies, however, the officer rarely learns of or understands the reasons for the exclusion of evidence, so the sanction fails in such instances to fulfill its objective. It can even be said that the rule has inhibited proffering of effective guidance to police officers: judicial reliance on and belief in the efficacy of the rule have led to the development of intricate, little understood rules of constitutional procedure and, regarding responsibility for officer direction, have diverted attention from police management to the judiciary, though the judiciary does not have a clear understanding of the daily operations of police agencies.

Administrative rule-making, from which would flow policies, procedures, and rules and regulations for structuring and controlling police conduct, has been advocated by numerous prestigious organizations and prominent spokespersons, some of which include the following: the American Bar Association [ABA Project on Standards for Criminal Justice, Standards Relating to the Urban Police Function § 6.2 (1976)]; The National Advisory Commission on Criminal Justice Standards and Goals [Report of the Task Force on Police, § 1.3, Commentary (1973)]; The National Advisory Commission on Civil Disorders [Report, 310–11, 314 (1968)]; Chief Justice Warren Burger ["Who Will Watch the Watchmen," 14 American University Law Review 1 (1976)]; Kenneth Culp Davis [Discretionary Justice—A Preliminary Inquiry" (1971)]; Frank Remington, Herman Goldstein ["Policing In a Free Society" (1977)]; and Anthony Amsterdam ["Perspectives on the Fourth Amendment," 58 Minnesota Law Review 349 (1974)]. In addition, the courts have frequently suggested the need for such rules. See, e.g., *Delaware* v. *Prouse,* 440 U.S. 648 (1979); *Brown* v. *Texas,* 443 U.S. 47 (1979); *Dunaway* v. *New York,* 442 U.S. 200 (1979); and *South Dakota* v. *Opperman,* 428 U.S. 364 (1976). Some police departments have attempted to develop and implement such rules, among which departments are the following: Boston, Massachusetts; Madison, Wisconsin; and Washington, D.C. The rules provide clear, affirmative guidance to officers as to how they may proceed in a wide variety of complex situations; such rules contrast court decisions that restrict discussions to what an officer cannot do and are rendered in a manner not usually understood by police officers. These rules address such procedures as execution of search warrants, searches incident to arrest, motor vehicle searches, stop and frisk, and eyewitness identification.

The incorporation of administrative rule-making into our alternative procedure provides several advantages over the exclusionary rule, given the rule's current application. Courts would first focus on the procedures required by the rules and, second, on the past conduct of individual officers. This would redirect judicially-imposed responsibility for constitutional violations from officers to police administrators. Police officers, as with employees of any organization, are more likely to adhere to rules established by their agencies than to rules imposed from without by the courts. Developing clear, precise directives that are free of the legal terminology contained in many court opinions and that are written in language more easily understood by police officers could make the rules easier to understand and more likely to be followed.

Administrative rule-making would exert a broader influence on police operations than the exclusionary rule; its use within constitutional restraints would help in an array of law enforcement operations because police expertise would be utilized systematically and continuously. Judges, who lack law enforcement expertise, promulgate rules through an adversary process whose sole focus is on particular facts unique to individual cases. By contrast, police administrators, who understand the realities of police behavior, are able to fully grasp the implications of promulgated rules for all law enforcement needs. In developing rules, administrators would be able to utilize procedures best suited to the realities of law enforcement, while remaining within the confines of constitutional requirements. In addition, because many police activities are currently unregulated by the courts, i.e., activities not directed toward gathering evidence or leading toward prosecution, rule-making can lead to full definitions of rights of criminal suspects and other persons coming in contact with police. Finally, the visibility of the rule-making process would compel

police administrators to make conscious assessments of law enforcement practices insofar as the practices relate to constitutional and other legal requirements and would make administrators more accountable for decisions that should be based on such assessments.

The development of administrative rules regarding police procedure would have tremendous impact in helping to control police misconduct and in preserving constitutional values. Departmental rules governing activities of officers would be applauded by street officers; the rules would free officers from the vague and clouded language of court opinions; officers could look to police guidelines that set specific bounds of conduct. The courts could find either that officers were in violation of their departments' procedures or, in some instances, that the procedures at issue were unconstitutional, thereafter requesting that departments revise such procedures so that they meet constitutional requirements.

Police training

Development of extensive rules guiding constitutional behavior will have little value if officers are not apprised of them. Publication of the rules, though an important first step in communication, is not sufficient. Officers must be taught how, and the circumstances under which, they may invoke police procedures. Training programs should be devised in such a manner that officers acquire not only the substantive information contained in departmental rules but also insight into ways in which they may, within constitutional limits, proceed with their tasks. The need for training is not limited only to police recruits. Continual revision of regulations, reflecting refinements in constitutional requirements, will necessitate that police officials develop in-service programs to re-train their officers in accordance with changes that are made. Finally, remedial training programs should be designed to reinforce proper procedure for those officers who have violated rules in the past.

Strict police discipline

Deterring unconstitutional violations requires that officers be made aware that illegal behavior will not be tolerated; to make this known, an effective system of discipline must be instituted. Though precise rules and regulations are essential to defining kinds of behavior that will be subject to discipline, rules alone are insufficient. If rules are not properly enforced, their objective to conform police behavior to the provisions of the Constitution will not be achieved. A comprehensive system of internal police discipline, administered fairly and effectively, will promote observance of the rules.

Regarding deterrence, punishing officers for improper conduct has several advantages over the current exclusionary rule sanction. First, because of the relative immediacy and personal nature of disciplinary actions, officers would generally be aware that their conduct was in violation of constitutional requirements; given how the exclusionary rule is applied today (and depending on the agency), officers might not learn of or understand a court's rationale for excluding evidence; in any event, they would not be affected personally. Second, the publication of clearly defined rules, of penalties for violating them, and of the ramification of the disciplinary process would make it clear to the entire police force, as well as to the community, that certain behavior will not be tolerated. Third, police officer aversion to disciplinary action would cause officers to conduct themselves according to proper procedures. Fourth, a system of discipline could introduce the concept of gradations of improper behavior. The exclusionary rule operates uniformly and imposes an inflexible penalty for all violations, minor or major. An effective disciplinary system could apply a variety of penalties tailored according to the seriousness of misconduct. Finally, sanctions that result from enforcement of rules and regulations could be applied with much greater frequency than the exclusionary rule sanction; only a small percentage of investigations, searches, arrests and interrogations now reach the trial stage.

WHY THE ALTERNATIVE PROCESS PROPOSED BY THE FORUM IS THE MOST EFFECTIVE METHOD TO DETER FOURTH AMENDMENT VIOLATIONS

The alternative the Forum proposes is a complete package that must be viewed as a whole: the components are interweaved; each one complements the others; implementation of one component alone will provide neither an adequate substitute for the exclusionary rule nor relief from the problems currently surrounding the rule's use.

The key to the Forum's alternative is placing with police administrators responsibility for ensuring police officer compliance with constitutional requirements. Inter-

nal regulation is the most effective means by which police misconduct can be deterred. Police managers, as opposed to persons outside the agency, have greater understanding of police officer behavior and of the culture of the law enforcement community and are, therefore, more effective in causing officers to understand and comply with constitutional procedures.

If police departments realize that their efforts are to be rewarded by the admission during trials of evidence that might previously have been excluded, they will be strongly motivated to formulate rules and to institute training and discipline. Departments that develop rules and regulations in compliance with the Constitution will not be restrained by the straitjacket of suppression motions. An objective test for determining whether or not departments have developed internal regulatory mechanisms to deter police violations will be applied by the courts. Judges will simply look to departments' good faith efforts to establish effective rules and to institute training and disciplinary systems, allowing evidence into courtrooms if departments pass the objective test. In effect, the court will be turning over to police departments the responsibility for disciplining police officer misconduct, while holding departments responsible for their policies on constitutional rights.

The procedure for determining whether or not the exclusionary rule would be applied in an individual case involves the following steps:

1. If a department has a rule governing the practice under court scrutiny, which rule is found to be constitutional, and if an officer complied with the rule, the evidence obtained as a result of the procedure would be admitted in the case.

2. If an officer fails to comply with a department's constitutional rule, and if the department has a history of disciplining its officers for violations, the evidence would likewise be admitted. Under such circumstances, the officer would be disciplined directly by the department rather than indirectly by the court.

3. If a rule is found to be unconstitutional, the court would look at whether or not the rule was promulgated in good faith and in the reasonable belief that it complied with constitutional requirements. Furthermore, if a department has a history of training and disciplining its officers for violations, that department would merely be required to re-promulgate its rule according to proper procedures, deterring future violations while providing the benefit of use of the evidence in the immediate trial. If a department failed to meet these tests, the evidence would be excluded from the trial.

To provide an example of how this process would operate in an actual case, I will use the facts of the case *United States* v. *Adams,* 621 F.2d 41 (1st Cir, 1980). In that case, FBI agents had information regarding the possibility that an escaped murderer was living in the house of a former cellmate. This information was corroborated on a Wednesday by a social worker who had visited the residence. On Thursday at 8:30 a.m. the agents again questioned the social worker to see if the escaped convict was still there and found out she was. At 9:50 a.m., seven FBI agents went to the house and, after searching the premises, arrested the fugitive without having obtained either an arrest or a search warrant.

In the trial of the former cellmate for harboring a fugitive, the court excluded the evidence that the fugitive was there. The court found that there were no exigent circumstances to justify a warrantless arrest or search, stating there was ample time to obtain a warrant.

As in the case of an officer's entry into the home of a suspect to make an arrest, the court found that, absent exigent circumstances or without consent, the Fourth Amendment requires that a police officer must obtain a search warrant before entering the home of a third party to execute an arrest warrant. Thus, under the exclusionary rule as it currently operates, the evidence was excluded from the trial because of the FBI agents' failure to abide by the Fourth Amendment requirements.

Assuming for the moment that the Forum's proposed process were in place, the evidence in this case would not necessarily be excluded. The court would first find out whether or not the FBI had promulgated a rule covering an arrest in the home of a third person, i.e., whether or not a search warrant should first have been obtained. If the court found that the FBI had no rule, the evidence would be excluded. The Bureau, having failed to carry its responsibility for deterring constitutional violations by promulgating a rule, would be responsible for the possible lost prosecution were the evidence to be excluded.

If, however, the court found that the FBI had a rule calling for a search warrant in these circumstances and that the agents violated it, the court would ask the following two questions:

1. Does the FBI conduct a program to train its agents to follow the appropriate procedures for searches and seizures as outlined in its periodically updated rules?

2. In the past, has the FBI disciplined those officers who were found to have violated its search and seizure rules?

If the answers to these questions were, yes, the court would admit the evidence into the trial, stating for the record its reasons for doing so; the FBI would be found to have carried its responsibility for deterring agent misconduct; FBI-imposed discipline would have supplanted the utility of the exclusionary rule as the rule is currently applied.

ADVANTAGES OF INTERNAL REGULATION REQUIRED IN THE PROCESS PROPOSED BY THE FORUM

In our alternative, the focus of attention shifts from individual officers to police departments. If departments make good faith efforts to define and enforce constitutional behavior, evidence resulting from investigations should not be suppressed. Use of evidence gathered in criminal proceedings will restore the confidence of the police and the public in the criminal justice system. A balance between rights of criminal suspects to be protected from intrusive police behavior and rights of citizens to be protected from criminal acts will be restored.

Once implemented, our comprehensive approach to handling constitutional violations by police officers should prove to be the most appropriate substitute for the exclusionary rule. Placing responsibility for constitutional violations on police administrators is the most logical method for deterring police misbehavior: rules and regulations will provide effective guidance to officers, while strict internal disciplinary procedures will ensure that discipline is more frequently applied than is now possible under the exclusionary rule. With clear departmental rules there will be less question as to when officers are in the wrong so that administrators will feel more comfortable in applying discipline. Regarding punishment, our system will allow for distinguishing gradations of violations. The development of explicit, comprehensive rules and regulations by police departments will provide a way of clearly spelling out the meaning of constitutional requirements, taking into account the realities of law enforcement practices. The introduction during trials of evidence that might previously have been excluded will increase chances that criminals will be brought to justice. The focus of the trial will shift back to alleged wrongdoings of defendants, increasing the likelihood of swift and certain punishment for criminal activity. The police and the public's respect for the law and the criminal justice system will increase; and what is most important, citizens will be protected, before the fact, from illegal police conduct in all areas of law enforcement activities—even those areas not involving evidentiary matters—because of the deterrent effect of this approach.

GRADUAL REPLACEMENT OF THE EXCLUSIONARY RULE

Incorporating the three components of rule-making, training and discipline into a single, comprehensive alternative can lead to eventual replacement of the exclusionary rule, eliminating the problems the rule has engendered. Immediate implementation of our alternative will provide partial relief from the exclusionary rule's disadvantages and, eventually, could completely supplant dependence on the rule as a means of deterring unconstitutional police behavior; use of the exclusionary rule, however, will continue until our alternative has proved itself worthy. Determining when to apply the rule will, nevertheless, become easier; using an objective test for determining departments' good faith efforts will simplify the rule's use. Only after our alternative has been proven to be an effective substitute for the rule will the rule be discontinued. In effect, the exclusionary rule simply will atrophy.

The exclusionary rule is an integral part of the Forum's alternative. The prospect of its elimination is an incentive for police departments to develop effective controls over unconstitutional behavior of officers. Use of the exclusionary rule as an incentive to develop internal regulation of unconstitutional behavior is similar to use of the bail-out provision in the Voting Rights Act extension. Under the bail-out provision, if a jurisdiction remains free from discriminatory violations for 10 years, it will no longer be subjected to pre-clearance by the Department of Justice for its changes in election procedures. Similarly, under our proposed procedure, if a police department demonstrates a pattern of good faith efforts to deter unconstitutional behavior, it will be freed from the constraints of the exclusionary rule.

As experienced law enforcement executives, we firmly believe that internal regulation of law enforcement practices is the best possible approach to deterring unconstitutional violations. We are not, however, unrealistic: our belief must not lead to overconfidence. Though the measure of professionalism in law enforcement has increased remarkably over the years since the *Mapp* decision, many more improve-

ments must be made. The process of improvement will necessarily be gradual. At first, most police departments could not fully meet changed standards without making extensive changes. Developing rules and regulations for conforming police conduct to constitutional safeguards will be a monumental task. Some departments will have to restructure their disciplinary systems extensively.

Nonetheless, police departments will gradually adopt extensive and comprehensive rules regarding constitutional procedures and will begin to take appropriate disciplinary action against officers who violate these rules. Some departments will initiate these modifications on their own; others will do so under pressure from prosecutors, the media and the public to lift the burden of the exclusionary rule.

DISADVANTAGES OF OTHER PROPOSED ALTERNATIVES TO THE EXCLUSIONARY RULE

Though the underlying philosophy of current proposals to modify or abolish the exclusionary rule is that something must be done about the current operation of the rule, we believe that none of these proposed alternatives will provide an effective solution to the problem. Before commenting on these proposed alternatives, however, one cautionary note should be raised: the ill effects of the rule should not be confused with the restrictions imposed by the Constitution. It is often argued that the rule handcuffs police in enforcing the law. It is not the rule, but, rather, the Constitution itself that quite properly creates obstacles for overzealous police officers. The increased judicial scrutiny that followed the rule's introduction has created for some, the illusion that, if the exclusionary rule were abolished, many of the constitutional restrictions imposed on police would also be abolished. This is a gross misconception: abolishing the current rule would not do away with the constitutional provisions prohibiting illegal search and seizure. The fundamental principles of the Constitution must, of course, be preserved. An alternative's only function is to change the remedy used when violations occur, while providing a mechanism that promotes police adherence to constitutional requirements.

Provision of civil remedies

The primary goal of this alternative is to deter constitutional violations by providing for use of a civil damage action against both the police officer and the government. Though well-intentioned, we believe this alternative will fail in practice. Like current civil remedies, we believe such a damage remedy will be mainly illusory. There are several reasons for this. First, few suits, especially in comparison to the number of violations, will likely be brought: bringing and maintaining a civil action is expensive, burdensome, and time consuming. Currently, overcrowding of court dockets delays the hearing of federal court cases by an average of 13 months and the hearing of state court cases by up to seven years. Victims of illegal practices, who are not themselves involved in criminal behavior, would consequently have less incentive to challenge the police than criminal defendants. Bringing suit would consume a vast amount of a plaintiff's time and could lead many to believe it would not be worth the effort. The infrequent bringing of such suits would result in less judicial review of police practices and, what is more, less guidance for police.

Second, often the only witnesses to an event are the plaintiff and the defendant officer; in such instances the issue becomes one of credibility. Because juries tend to be sympathetic toward police officers confronted with liability, awards against the police might be infrequent. Third, for those plaintiffs who do prevail, compensation will likely be pathetically meager. Because the measure of damages will be the extent of physical injury to the plaintiff or to property, the careful officer could avoid all but nominal damages. Fourth, the damage remedy provides little direct incentive for police to develop internal rules. The deterrent effect would amount to little more than what is already provided by rule applied today.

Though a new damage remedy might serve better to compensate victims of constitutional violations than current civil remedies, it would not satisfactorily replace the exclusionary rule. Because such civil actions would be infrequently brought, they would not serve to systematically highlight police misconduct. More importantly, the remedy comes after the fact of the violation; it does not provide adequate incentives for establishing means of deterring misconduct before it occurs.

ELIMINATION OF "GOOD FAITH" EFFORTS FROM THE EXCLUSIONARY RULE SANCTION

The thrust of this alternative is to limit the application of the exclusionary rule to those instances in which it is believed that individual police officers will be deterred by its application. A similar purpose is found in the recommendation of the Attorney General's Task Force on Violent Crime to exclude "good faith" efforts from the rule. The rationale behind this proposed alternative is that, when police

officers make reasonable, good faith efforts to comply with the law but unintentionally fail to do so because of minor technical violations, it is difficult to find any deterrent effect in suppressing the evidence that was wrongfully obtained; under such circumstances, excluding the evidence from trial has little effect on officers' future behavior; it merely allows defendants to benefit and undermines public confidence in the criminal justice process. This alternative, though sound in theory, will be cumbersome in practice; its effect will likely be to undermine the deterrent purpose behind the rule, possibly leading to an increase in constitutional violations.

This alternative suggests limiting application of the exclusionary rule to those cases in which it is shown that the officer knowingly intended to violate someone's constitutional rights or when the violation was substantial. "Good faith efforts" by the police officer and "honest mistakes" on the part of the officer would not be subject to exclusionary rule application. The essential component of this alternative is that the exclusionary rule would be applied only when the accused police officer has a specific intent to take away a right which has been established either by the express terms of the Constitution or by decisions interpreting them. Thus, when the officers have known or should have known their conduct was in violation of the Constitution, only then would the exclusionary rule be applied.

Determining how to apply the rule will require an extremely involved fact finding process, irrespective of whether the standard operates on intent, substance or good faith. Judges will be given the difficult task of examining the inner thought processes of officers to determine their true intent. Far from reducing the amount of fact-twisting that is alleged now to take place during suppression motions, this alternative would promote officer dishonesty regarding what were their true motives for acting. Dependence on discerning the subjective intent of officers would lead to departmental toleration of officer ignorance and would inhibit development of procedures to guide officers regarding proper behavior.

In an attempt to provide an objective measure for determining the application of the rule under this alternative, its proponents have suggested an added requirement that the officer's good faith belief be reasonable. We believe that such an objective measure is necessary to ensure law enforcement agencies' attention to constitutional requirements. The difficulty lies in the standards by which this reasonableness requirement is to be measured.

Some who advocate this good faith modification have stated that, to meet the reasonable requirement, an officer's police department must have promulgated rules and regulations outlining Fourth Amendment procedures, implemented programs to train the officers in those rules and regulations, and maintain a system for disciplining officers who violate their rules. These statements give us only moderate assurance, however; we are not confident that the judiciary will hold that these same standards are part of the reasonableness requirement. What is needed, instead, is explicit reference in the legislation itself that the test to determine whether an officer's good faith belief is reasonable depends upon whether the officer's department has a program consisting of the three elements: rules, training and discipline. If these three elements are defined in the legislation as the test of reasonableness, then the Forum's objective of placing responsibility for deterring constitutional violations upon police administrators will be met. Without such detail, we fear the nebulous standard of "reasonable" will be subject to ambiguous interpretation by judiciary. The result may lead to use of a subjective standard alone as the test of good faith. In that event, the focus of the exclusionary rule will remain upon the individual officer; the opportunity to increase law enforcement agencies' attention to proper Fourth Amendment procedures will be lost.

None of the alternatives to the exclusionary rule addresses what we believe is the most important consideration in devising a remedy for Fourth Amendment violations: law enforcement executives' assuming the responsibility for their officers' violations. This is the only way to ensure with certainty that constitutional violations are minimized. What is needed is a means of testing the good faith efforts of department administrators; such efforts are susceptible of objective measurement. Basing a test on individual officers' subjective intent in particular cases is not likely to prove productive. The Forum-developed alternative includes the necessary means of testing police administrators' good faith efforts. Our substitute process provides for an objective test by which departmental efforts to eliminate unconstitutional behavior can be gauged. Once departments have passed muster under this objective test, the exclusionary rule will not be applied.

CONCLUSION

As law enforcement executives who are responsible for the actions of our officers, accountable to the public, and answerable to the law, we believe that our alternative will deter constitutional violations by police officers and enhance the effectiveness of the criminal justice system. Under the process we propose, replacement of the exclusionary rule would come gradually; as the effectiveness of our process was proved, its use would gradually increase. Critics would no longer be able to complain of an artificial rule handcuffing the police in their efforts to fight crime. The key to removing the handcuffs would be placed in the hands of the police themselves. The task of establishing this alternative means of controlling police misconduct would be a time-consuming and arduous one. Judicial hearings on departmental rules, training and discipline systems would be extensive, especially in the beginning. Once the internal control systems were in place in police departments and their effectiveness in deterring unconstitutional behavior by the police was demonstrated, we believe the rewards would prove to have been well worth the effort. The alternative we have devised will best satisfy the primary purposes of the exclusionary rule and most effectively counter problems stemming from the rule's current use. These efforts will promote the ends of justice and help to preserve our Constitutional liberties.

Mr. McCollum. The subcommittee will come to order.

At this time, our final witness will be brought forward. He is Alan Ellis, Esquire. Mr. Ellis is testifying on behalf of the Philadelphia Bar Association. He is a practicing criminal lawyer, and is the first practicing representative of the private bar to testify during these hearings. We look forward to testimony from the perspective of a private defense attorney.

Mr. Ellis, we welcome you to the subcommittee. Your prepared statement, without objection, will be received into the record. Please proceed as you see fit.

TESTIMONY OF ALAN ELLIS, PHILADELPHIA BAR ASSOCIATION

Mr. Ellis. Thank you, Congressman.

I hope this afternoon to talk about what it is like in the real world of criminal defense and search and seizure.

Before I begin, I would like to note that the Philadelphia Bar Association has gone on record as opposing any substantial changes in the exclusionary rule. The association acted at the urging of the criminal justice section of the bar association.

The Philadelphia Bar Association, incidentally, is the oldest chartered metropolitan bar association in this country, established in 1804. It is comprised of 8,000 members of the bench and bar. Just as the Philadelphia Bar Association is reflective of the legal profession as a whole in Philadelphia, so I should note the criminal justice section is representative of all segments of the criminal justice system in Philadelphia. This section is neither the voice of the defense bar nor the prosecution. Our members include State and Federal prosecutors, private criminal defense lawyers—of which I am one—public defenders, judges, law professors, law enforcement officials and other criminal justice professors.

Mr. McCollum. You are representing the entire Philadephia Bar Association today?

Mr. Ellis. I am, sir.

Mr. McCollum. Thank you.

Mr. Ellis. As I mentioned, the bar has gone on record as opposing any substantial changes in the exclusionary rule for several reasons. One of the reasons that I would like to talk about today is

the fact that we feel that the proposed good faith exception change to the exclusionary rule would wreak havoc on the administration of criminal justice in this country. At a time when we are trying to reduce court costs and delays, introduction of a new good faith exception test would trigger years of litigation as courts are forced to throw out well-developed case law.

A good faith exception would also create an impossible administrative situation requiring judges and defense attorneys to delve into the subjective intent of police officers whose self-serving words the former are unlikely to discount and the latter are unlikely to refute. Given the nature of the inquiry, an officer's personality and manner of address may have more to do with the outcome of a case than would the facts of the arrest or the search involved.

Nor would the litigation likely be confined to scrutinizing the subjective processes of individual officers. Rather, the entire training program of a department would be at issue in at least some cases, and in others involving more than one officer—this is by no means a rare occurrence—the various and possibly conflicting states of mind of numerous officers would be at issue. The result would be an unabated waste of judicial resources.

I should point out that although I am a private criminal defense lawyer, studies show that over 80 percent of all criminal defendants are indigent and are represented by either the public defender or by court-appointed attorneys who, of course, are funded by the State and/or the Federal Government, as the case may be. If we go to a good faith exception to the exclusionary rule, it would be my opinion that the amount of court time involved will be multiplied at least fivefold.

You are going to have situations where, for example, in a search warrant case, if there is a case where evidence has been obtained as a result of search warrant, and I file a motion to suppress the evidence based on the fact that the search warrant is defective, essentially what happens is we have maybe a 10-minute hearing, the prosecution introduces the search warrant and affidavit in support of the search warrant in evidence, and it speaks for itself, unless I want to argue that there are material misstatements set forth in the affidavit in support of the search warrant. The judge simply takes a look at the search warrant. If I want to file a brief, I do so. If the prosecution wants to file a brief, he or she does so. And the judge essentially decides the case based on the facial validity or invalidity of the search warrant.

If you go to the good faith exception to the exclusionary rule, you are going to have lengthy litigation on whether, in fact, the officer acted in good faith when he made application for the search warrant, whether the magistrate acted in good faith when he approved the search warrant, and you are going to have much of this litigation, as I say, being done by public defenders. What we are going to need is a heck of a lot more public defenders. We are also going to need a lot more police officers. We are going to require additional judges. We are going to require more bailiffs, more court criers, and more sheriffs to support the prisoners. It is just going to multiply and be a tremendous drain on the resources of the judicial system.

Insofar as the cost to society of maintaining the exclusionary rule as we have it today—we hear a lot about criminals going free on technicalities. To be terribly candid with you—I am a criminal defense lawyer, that is all I do, and I do a lot of cases involving searches and seizures. I file motions to suppress evidence based on illegal searches and seizures. In the past 3 years, I haven't won one suppression motion. I don't know whether this says something about me, or whether it says something about the law or about the courts or about the prosecutors or about the police officers that were testifying. But as a practical matter, the empirical data show that few, if any, cases are thrown out because of illegal searches and seizures. I am telling you from personal experience that I am not winning any of them. I am talking with my friends and they are not winning any of them either.

This was not the case, admittedly, 10 or 15 years ago when *Mapp* v. *Ohio* was decided, when the police didn't really know how to go about drafting search warrants and they didn't really know what it took to make valid search and seizure. We were winning some cases then, but that is just not the case anymore.

Mr. McCollum. Let me ask you a question. Obviously, it sounds like either you do have a problem in the competence of your bar, which I seriously doubt you do, or the police, at least in Philadelphia, have improved their ability to understand and carry out the mandates of the exclusionary rule and the constitutional requirements. I don't know what it is around the country in other cities and communities.

Are you limiting your knowledge and testimony strictly to your experience in Philadelphia, or do you have a working knowledge that you could relate regarding what it is like in other communities?

Mr. Ellis. Yes, Congressman. I am a member of the board of directors of the National Association of Criminal Defense Lawyers and, as a consequence, I am very familiar with how it is throughout the country because I meet regularly with my fellow members of the association and we discuss how their search and seizures are going in other areas.

In addition to that, I have a statewide practice in Pennsylvania, and I have been in 47 of the 67 counties in our State. So I am all over the place. I am not just talking about Philadelphia, I am talking about State court, Federal court and the rural courts in the outlying areas.

Mr. McCollum. Let me ask another question in that area. We know your batting average in the actual cases where you make the motions to suppress, and I think there are some statistics that have been published nationwide that show a very low percentage of cases where the exclusionary rule has been successfully applied in recent years.

But is there not an underlying factor also present in many of these situations—that prosecutors are smart enough these days to recognize the bad cases before they get as far even as a motion to suppress and that, in many cases, the case isn't even brought, the charges aren't even made, because they know the cost and they have limited resources in their personnel and they just don't want

to spend the time with them? Isn't that also a major factor in why you are not seeing a higher percentage in that area?

Mr. ELLIS. Candidly, I wish it were. But I, again, have not had any case in recent memory where a prosecutor simply declined to bring the prosecution based on the fact that he thought he had a loser.

Quite recently, I had a situation where the prosecutor had said to me, "I think I have got a bad search and seizure here." But, nonetheless, the judge that we were in front of hasn't suppressed anything in 10 years. "I will tell you what I am going to do, Mr. Ellis," he said to me, "I am going to go ahead with the case and I am going to make my argument to the judge that the evidence not be suppressed, and I am sure the judge will go along with me based on his track record. If he does go along with me and refuses to suppress the evidence—and, of course, your client will then be found guilty subsequently because it was a drug case and the only issue in the case was the search and seizure issue—I am going to ask the judge to revoke your client's bail pending appeal, and he is going to sit there.

"Now, ultimately, you may prevail in the appellant courts, but it is going to take maybe a year before you get a decision in the appellant courts and, by that time, your client is going to have served his sentence."

Mr. MCCOLLUM. Yes; but isn't it true that many times you will never even see the accused unless he is in fact accused—that is, unless the person who committed the crime or is charged with committing it is actually charged? Isn't there a point of discretion that the prosecutor exercises, and his investigators exercise in advising him, "Don't even bother to bring these charges," and, therefore, you don't even have a client?

I am not trying to attack anything you are saying. I am just trying to get the full breadth of this. I question—and I want you to be as fully open about this as you can be—whether your knowledge, or any defense lawyer's knowledge, or the average attorney's knowlege, could go to the full depth of this particular aspect of the prosecutor's job since you probably don't even see the client. Is that or is that not the case?

Mr. ELLIS. Not really. I will tell you how it works generally.

A police officer stops a car because there is something wrong with the taillight. He approaches the driver's side of the car and the driver rolls down his window and the officer smells the smell of burning marihuana. Whereupon, he directs the occupants to exit the vehicle and he searches the car and finds the marihuana in the car. That person is placed under arrest right then and there.

It has only been recently, within the past 2 weeks in Philadelphia at least, where the charging function has been given over to the district attorney. In other words, once this person is brought down to the station house for processing, the district attorney reviews the case at that point to determine whether or not to throw the case out at that point or whether, in fact, to formally bring the charges.

As a practical matter, though—and this is only in Philadelphia—in the outlying areas, a district attorney or an assistant district attorney does not get involved in the case until well after the arrest

has taken place. Again, when you have got a search and seizure situation and contraband has been seized or confiscated, the arrest takes place immediately and the case goes on from there.

Mr. McCollum. You are making certain assumptions here, based on your experience which sounds like it is very full in that area. But I am still puzzled about why so many prosecutors—and a number of them in my district have said it to me—why so many of them want to see the changes in the law if, in fact, it is not creating problems for them today? Why are they asking for the changes?

Mr. Ellis. It is hard to say. Again, I am being very frank this afternoon, and I want to be able to do that. I think that one of the concerns that prosecutors have is that they realize that, to some extent, they are putting on perjured testimony. Officers are very experienced in knowing what constitutes a legal search and seizure and what doesn't.

My law partner, for example, is a former prosecutor with the Philadelphia DA's office. He has told me that when he was a prosecutor, he knew—I mean the cop didn't come out and tell him that he was going to lie on the stand—but he knew in his gut that the cop simply was fashioning his testimony to create what was otherwise an illegal search and seizure into a valid search and seizure. I think prosecutors feel uncomfortable about this. I think they feel that if the law were changed, they wouldn't have perhaps the police perjury that they do have today.

Mr. McCollum. You are advancing a little bit of the opinion that goes to the effect of why change the exclusionary rule since it is not doing any good anyway. In a sense, you are telling us that your own gut feeling about it is, though you don't have a lot of proof for it, that there are lots of violations, lots of perjured testimony, lots of opportunities for evidence to come in which really should be suppressed, but even the prosecutor can't sort that out. Is that a general assessment of what you are saying?

Mr. Ellis. I think that, in all too many cases, yes, that is what we are seeing, a lot of perjured police testimony with respect to illegal search and seizure.

Mr. McCollum. If that is the case, do you have an alternative or supplement? For example, the previous witness, Sue Marie Johnson, the deputy director of the Police Executive Research Forum, just testified about a suggested plan which we have not explored before and on which we don't have much detail other than her testimony, but it is a suggestion of, at least for the moment, keeping the exclusionary rule and having a system whereby the courts would allow the police to use self-discipline with oversight. That seems to be an oversimplification of what she said but, basically, that is what it is. They would retain control, but there would be an encouragement through this mechanism. She is suggesting that police administrators carry a heavier stick with their own people.

Do you think that that idea merits consideration, or do you have some other suggestion—perhaps the civil penalties need to be changed or the civil law needs to be changed with regard to bringing lawsuits against police who violate the constitutional rights of somebody? Do you have any suggestions?

Mr. ELLIS. Chairman Conyers asked the professor earlier whether in fact it was realistic to expect that the civil remedy can be an appropriate one to address the problems of violations of the fourth amendment.

I agree with Congressman Conyers in that I don't see the problem as one of inability to get access to the courts, because you can always bring what is known as a 1983 action, a civil rights action, in Federal court and, if you win, you get counsel fees. It is not a question of how much justice you can afford and whether you can get a lawyer to take your case. You can get a lawyer to take your case because he can get counsel fees now.

The problem is, as a practical matter, that the plaintiff, who may very well be a criminal who has been arrested based on an illegal search and seizure with 5 pounds of marihuana or whatever, is simply not going to get any kind of an award from a jury once the jury finds out that yes, there was an illegal search and seizure and, as a result of it, the criminal went free. So, I don't think the civil remedy is an appropriate one, No. 1.

With respect to the administrative remedy that was suggested by the previous witness as a supplement, I have no problem with that at all. I am a little cynical about it. Again, I am from Philadelphia. I lived under Frank Rizzo as the police commissioner for x number of years and as mayor for 8 years. I think that police officers were sort of like patted on the back for playing fast and loose with the fourth amendment in Philadelphia.

Mr. MCCOLLUM. It may work in some areas, but it might not work in Philadelphia; is that what you are saying?

Mr. ELLIS. Exactly.

I realize what I am saying here, that maybe if, in fact, the fourth amendment and the exclusionary rule is fostering police perjury, maybe that is a reason for getting rid of it. If it is corrupting the police, maybe that is perhaps a reason not to have the exclusionary rule.

Mr. MCCOLLUM. Would you penalize the police officer? Right now there is a debate under 1983, or there has been in the courts for some time, over the liability of an individual police officer—is he protected, is he not, constitutionally and otherwise. Do you think that by making the individual police officer subject to liability, if you will, for trespassing over fourth amendment rights, particularly these types, we could provide some mechanism to further get this problem addressed other than the mechanisms that have been suggested here?

Mr. ELLIS. Again, the problem there is one of—we go back to the police perjury again. If you have a cop's job on the line, perhaps he has more motivation to stretch the truth than simply if he were going to have a case thrown out. So I don't really see that that is in fact the answer. Again, as a supplement, fine; as a replacement, no.

I think that the value of the exclusionary rule is in its symbolic message to the police. I think that if we did away with the exclusionary rule or modified the exclusionary rule, the message would go out to the police departments that the courts no longer care about the fourth amendment and it is open season on the citizens.

Mr. MCCOLLUM. I am not suggesting necessarily we throw out the exclusionary rule. I don't mean that. I think all of the discus-

sions we are having here are aimed at what can we develop as potential alternatives or supplements to it. The one area that intrigued me is the whole area of section 1983, perhaps because I was involved in a 1983 suit pursuing a police department and a city and a police officer at one time. I am aware of that law fairly well. I know that you have a difficult time with the law, but it has a lot to argue for it. There is a lot for the plaintiff—in that case, the person who has been deprived of his constitutional rights. But whether or not it is an effective mechanism in deterring police officers depends on how effectively it is used, whether the city really cares, and if the money damages are severe enough to make it all come about.

There are cases where it has been enforced rather vigorously and damages have been awarded. I am sure that cities and police departments have taken a lot of note as a result of it. Have you any working familiarity with that type of litigation, or is your experience strictly limited to the criminal side of it?

Mr. ELLIS. Mostly criminal, and not very much in the way of police misconduct. I am aware of substantial awards for police misconduct, but not really violations of the fourth amendment type of police misconduct, like shooting somebody they shouldn't have shot and that sort of thing, police brutality, those types of recoveries.

In all fairness, though, I will tell you that we in Pennsylvania have a relatively new wiretap law. It was enacted back in 1978. For the first 2 years that it was in existence, there was a provision of the wiretap law that said that if a police officer violated the wiretap law, he would lose his pension. As a result of that, we didn't have any wiretaps in Pennsylvania for the first 2 years of the law.

So, if you are asking me does something like that deter police misconduct, I have to answer yes, it does. So, in answer to your question, Congressman, if you put teeth in the law, you will in fact deter a policeman's conduct.

I think that perhaps in a wiretap case, the decision as to whether there has been police misconduct does not depend on the testimony of the police officer versus the testimony of the defendant. It is kind of if you don't dot your i's and cross your t's in a wiretap case, it is there on the face of the record; whereas if it is a car stop——

Mr. MCCOLLUM. Our chairman has just come in. I am about to turn the forum back over to him, and I am going to have to excuse myself.

Before I do that, I would like to make two comments to you. No. 1, I certainly think you have been and are an articulate witness, and we hope that you will continue—I do personally—to contribute to whatever development we have of any legislation in this area, or whatever forums we have to further explore this subject.

No. 2, despite your experience in Philadelphia—you have been quite straightforward and honest about that—I have great doubts from what I hear from my area in Florida that we really do not have a problem. I think we do have one down there with the exclusionary rule. I think it is a problem in other parts of the country. But how grave a problem it is, how universal it is, I don't know. You have contributed to our knowledge, at least in terms of what it is like in Philadelphia and the areas that you are familiar with and, for that, I am grateful.

With regard to the ideas that we have exchanged here today, you and I, on alternatives and supplements, I think we have made some considerable progress, and I hope we have contributed to the subcommittee's efforts in this regard. I again want to thank you. Because I will have to excuse myself, as well as turn the gavel back over to the chairman, I thank you again.

Mr. Chairman.

Mr. CONYERS. Thank you very much, Mr. McCollum.

Do you have any concluding comments, Mr. Ellis?

Mr. ELLIS. Just to summarize and to conclude, I don't think we are paying a very high price for having the exclusionary rule and keeping it in its present form. We are not seeing criminals go free as a result of it. I think that the down side of doing away with it or modifying it is so great as to outweigh any justification for modifying it or abolishing it in its entirety.

Mr. CONYERS. You have represented the Philadelphia Bar Association quite well. I hope that you will continue to inquire into alternative remedies.

Mr. ELLIS. As supplements.

Mr. CONYERS. Yes.

Mr. Shaw, have you any comments?

Mr. SHAW. I have just a very quick one, a comment to the witness' last statement that cases weren't being lost because of the exclusionary rule. I think, though, that we must also recognize that a lot of cases are not being filed because of violations of the exclusionary rule, where the prosecuting authority knows full well that the evidence is not admissible which would indeed convict the defendant if the case were filed than if it were filed and if it was admissible.

I think what we are seeing is the prosecution authorities filtering cases out because of the exclusionary rule, which has the end result of not getting prosecutions, successful prosecutions, as a result of violations of this rule.

Mr. ELLIS. Congressman, Congressman McCollum had asked me that question earlier. My response to that, respectfully, was that in my experience that wasn't the case, that most of these search and seizure cases were what we call on-site search and seizure where the policeman stops a car and finds drugs in the car and makes the arrest right then and there, and the prosecutor doesn't really get involved with the case until later on and says, "You messed up and I am going to throw the case out." The prosecutors say to me "the cop is my client; I've got to take care of him," and they will push. The cases may wind up in plea bargains and I may get a better deal as a result of the fact that there was an illegal search and seizure in the case, but, quite frankly, to my knowledge, I have never been involved in a situation where a case was not brought because of an illegal search and seizure.

Mr. SHAW. I might just add to that comment that a lot of times the client does not get indicted and needs your services because the case has been thrown out before you came into the picture or before the need for the services of an attorney.

Thank you, Mr. Chairman.

[The complete statement of Mr. Ellis follows:]

STATEMENT OF ALAN ELLIS ON BEHALF OF THE PHILADELPHIA BAR ASSOCIATION

Mr. Chairman and the members of the subcommittee, I am pleased to appear before you on behalf of the Philadelphia Bar Association—the oldest, chartered metropolitan bar association in the United States. Comprised of more than eight thousand members of the bench and bar, the Philadelphia Bar Association, amongst its other functions, represents the Philadelphia bar before the public and government agencies seeking to increase awareness of the lawyer's role in our society. Through its programs, including my appearance here today, the Philadelphia Bar Association stresses public service and involvement.

As a practicing criminal defense lawyer and a member of the Association's criminal justice section, I have been designated to represent the Association before this subcommittee.

My own background in the criminal justice area consists primarily of defending individuals accused of criminal offenses. As a trial lawyer I am admitted to practice before the United States District Court for the Eastern District of Pennsylvania in Philadelphia, and, as an appellate lawyer, I am admitted to practice before the United States Court of Appeals for the Third Circuit as well as the Supreme Court of the United States. I am a former assistant professor of law at Golden Gate University School of Law in San Francisco. Before going to Golden Gate, I worked as a federal law clerk to two federal district court judges in the United States District Court for the Eastern district of Pennsylvania in Philadelphia.

Just as the Philadelphia Bar Association is, of course, reflective of the legal profession as a whole in Philadelphia; so, I should note, is the Criminal Justice Section representative of all segments of the criminal justice system. The Section is neither the voice of the defense bar not the prosecution. Our members include state and federal prosecutors, private criminal defense lawyers, public defenders, judges, law professors, law enforcement officials and other criminal justice professionals. We try to reflect a balanced view in policy positions which we adopt.

The Philadelphia Bar Association publicly opposes efforts embodied in pending federal legislation in the United States House of Representatives and the United States Senate to abolish or substantially modify the Fourth Amendment exclusionary rule. At its September, 1982 meeting, the Board of Governors of the Association formerly adopted the following resolution:

Whereas, a number of bills have been introduced in the United States Congress, both Senate and House, which would abolish or modify the Fourth Amendment exclusionary rule and

Whereas, the American Bar Association is vigorously opposing the legislation, and

Whereas, we believe Congress lacks the constitutional authority to modify or abolish the exclusionary rule, since the United States Supreme Court in *Mapp* v. *Ohio,* 367 U.S. 643 (1971) held that the rule is an essential part of the Fourth and Fourteenth Amendments, and

Whereas various studies, including a 1979 study by the General Accounting Office, have found that the exclusionary rule has minimal impact on the outcome of cases, and

Whereas, the proposed changes would wreak havoc on the administration of criminal justice in this country by introducing a "good faith" exception test which would trigger years of litigation at a time when we are trying to reduce court costs and delays, and

Whereas, the introduction of such "good faith" tests would constitute a step backward in the administration of justice, running contrary to the decisions in numerous cases which have held that decisions on the existence of probable cause should be made by a detached and neutral magistrate, rather than by the police officer on the firing line, and

Whereas, the adoption of "easy" or simplistic solutions to the nation's serious crime problem would result in the abandonment of constitutional protections without resulting in increased convictions or protections for the citizens, and

Whereas, such attacks on constitutional protections constitute a dangerous inroad on judicial safeguards intended to protect citizens from overzealous law enforcement which might lead to a police state, and

Whereas, the Criminal Justice Section has voted at its regular September meeting to oppose the present efforts embodied in pending federal legislation to abolish or substantially modify the Fourth Amendment exclusionary rule in Federal Court litigation: Now therefore, be it *Resolved,* That the Board of Governors at the request of the Criminal Justice Section and the Civil Rights Committee oppose publicly efforts embodied in the pending federal legislation in the United States House of Repre-

sentatives and the United States Senate to abolish or substantially modify the Fourth Amendment exclusionary rule.

Accordingly, we urge the subcommittee to reject proposals to modify or eliminate the rule in criminal trial proceedings.

Several bills are now pending in the Congress to abolish or modify the exclusionary rule. H.R. 4259, (introduced by Congressman Beard) would nullify any constitutionally mandated exclusionary rule in federal criminal proceedings. The bill would create a tort remedy in its place. H.R. 4606 (introduced by Congressman Collins), H.R. 5971 (introduced by Congressman Sawyer and Congressman Hughes), H.R. 6049 (introduced by Congressman Lungren) and H.R. 4422 (introduced by Congresswoman Fiedler) are all bills embodying various ways to create a "good faith" exception to the exclusionary rule. These bills would eliminate application of the rule in federal, and in some instances, state criminal proceedings, where the evidence was obtained by a law enforcement official who was acting in a reasonable good faith belief that his conduct was lawful. Several of these bills, also create a tort remedy to replace the exclusionary rule.

Insofar as H.R. 4259 is concerned, we do not believe that Congress has the constitutional authority to abolish the exclusionary rule. When the Supreme Court of the United States held in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments it constitutionally proscribed the Congress from revoking or rescinding the exclusionary rule in the administration of the American Criminal Justice System. Only the Supreme Court has the authority to remove or reduce the application of the exclusionary rule. *United States* v. *Calandra,* 414 U.S. 338 (1974) (federal grand jury proceedings); *United States* v. *Janis,* 428 U.S. 433 (1976) (federal civil proceedings); *Stone* v. *Powell,* 428 U.S. 465 (1976) (federal habeas corpus relief); *United States* v. *Ceccolini,* 435 U.S. 268 (1978) (attenuation); *United States* v. *Crews,* 445 U.S. 463 (1980) (in-court identification); *United States* v. *Havens* 446 U.S. 620 (1980) (impeachment); *United States* v. *Salvucci,* 448 U.S. 83 (1980) (standing). H.R. 4259 is, therefore, patently unconstitutional in our view.

A less radical proposal presently pending before the Senate is S. 101 introduced by Senator DeConcini. It is calculated to retain the federal exclusionary rule only in cases where there is an "intentional or substantial" violation of the Fourth Amendment. The criteria enumerated in the bill as to a determination of substantiality—recklessness—privacy invasion—deterrence—inevitable discovery, or attenuation—would, in fact, provide a federal court with a basis for allowing admission of virtually all illegally seized evidence. S. 101 purports to permit what the Fourth Amendment prohibits. It is thus facially violative. *Torres* v. *Puerto Rico,* 442 U.S. 465 (1979); *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973); *Berger* v. *New York,* 388 U.S. 41 (1967); cf. *Camara* v. *Municipal Court,* 387 U.S. 523 (1967); *Sibron* v. *New York,* 392 U.S. 40 (1968); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972); *Marshall* v. *Barlow's Inc.,* 436 U.S. 307 (1978); *Brown* v. *Texas,* 443 U.S. 47 (1979); *Ybarra* v. *Illinois,* 444 U.S. 85 (1979). It plainly violates constitutionally mandated guarantees. It is also facially void for the additional reason that it abolishes the standard of reasonableness enunciated in *Ker* v. *California,* 374 U.S. 23 at 33-34 (1963).

A third proposal to limit the application of the exclusionary rule may be found in the Administration's recommendation to the Congress that evidence obtained in the course of a reasonable, good faith search should not be excluded from federal criminal trials. This recommendation, however, in our belief is also unconstitutional. The Supreme Court of the United States has consistently rejected the so-called "good faith" test. *Stacey* v. *Emery,* 97 U.S. 642 (1878); *Director General of Railroads* v. *Kastenbaum,* 263 U.S. 25, 28 (1923); *Carroll* v. *United States,* 267 U.S. 132, 162 (1925); *Henry* v. *United States,* 361 U.S. 98, 102 (1959). *Taylor* v. *Alabama,* U.S., 31 Cr.L. 3118 (1982). But, see, *Illinois* v. *Graves,* — U.S. —, (Petition for Reconsideration granted November 29, 1982).

A "good faith" exception to the exclusionary rule is, in fact, wholly incompatible with the reasoning and purposes of the rule. If adopted, it would ultimately reduce the Fourth Amendment to a "form of words" and leave our society open to transformation into a police state.

The Fourth Amendment to the federal Constitution is the fundamental provision by which the privacy rights of all Americans—homeowners and drifters, motorists and pedestrians, users of telephones and writers of letters, law-abiding citizens and criminals—are protected under federal law. Ever since the unanimous decision in *Weeks* v. *United States,* 232 U.S. 383, (1914), it has been implicit in the federal system that the admission of illegally seized evidence would render the Fourth

Amendment of "no value," that if admission were to be allowed, the Amendment "might as well be stricken from the constitution." Id.

Even though recent Supreme Court cases have focused on deterrence of unlawful police conduct as the primary justification for the exclusionary rule, downplaying the value of other considerations, cf., e.g., *Stone* v. *Powell,* 428 U.S. 465; *United States* v. *Peltier,* 422 U.S. 531, (1975), it is clear that this fundamental rule furthers at least four other vital goals:

First, the exclusionary rule upholds "the imperative of judicial intergrity" in litigation involving Fourth Amendment rights, for, as the Court stressed in *Elkins* v. *United States,* 364 U.S. 206, (1928), "'no distinction can be taken between the Government as prosecutor and the Government as judge.'"

Second, as Chief Justice Warren, a former California Attorney General, pointed out in *Terry* v. *Ohio,* 392 U.S. 1, 13 (1968), the exculusionary rule is the sole judicial means by which citizens' Fourth Amendment rights may effectively be protected: ". . . . *experience has taught that it [the exclusionary rule] is the only effective deterrent to police misconduct in the criminal context,* and that without it the constitutional guarantees against unreasonable searches and seizures would be a mere 'form of words.'" (emphasis added).

Third, the exclusionary rule plays a critical role in the development of substantive Fourth Amendment law. Mertens and Wasserstrom illustrate this point in their lengthy analysis, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L.J. 365 at 404, 405–406 (1981):

"By functioning as the primary mechanism through which the courts develop and articulate the limits of the Fourth Amendment itself, the exclusionary rule plays an indispensable role in preventing Fourth Amendment violations . . . even when a court declines to suppress evidence."

Professor LaFave adds that: "I believe that adoption of the good faith exception would, as Justice Brennan has predicated, stop dead in its tracks judicial development of Fourth Amendment rights. LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,'" 43 Pitt. L. Rev. 307, 354 (1982) (quoting Brennan, J., dissenting in *United States* v. *Peltier,* supra, 422 U.S. at 554, 45 L.Ed. 2d at 391).

Fourth, the exclusionary rule serves as an overriding symbol of our society's commitment to the primacy of law over the raw power of government and its agents "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). Indeed, to at least one observer, "[T]he symbolic value of the exclusionary rule is perhaps its most immeasurable aspect." Galler, "Is the Evidence in on the Exclusionary Rule?" 67 ABA J. 1642, 1645 (1981).

Any serious analysis of the Fourth Amendment cannot ignore each of the above considerations, but even if one looks only to the question of deterrence, the overwhelming value of the exclusionary rule is clear. Deterrence may be either individual or general. While the former is admittedly difficult to establish in an individual case, on a larger scale the deterrent value of the exclusionary rule is most demonstrable.

Even if the rule's impact is unquantifiable in individual cases, it is nevertheless real. Professor Loewenthal concluded after countless interviews with and observations of New York City Police Officers from 1971 to 1974 and again between 1976 and 1978 that: "There is substantial evidence that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained." Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L. Rev. 24, 29 (1980).

Moreover, the rule "compel[s] respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it." *Elkins,* supra, 364 U.S. at 217.

Beyond individual case deterrence, there is a plainly visible systemic deterrence illustrated, in part, by the existence of extensive, high-quality police training programs in constitutional rights that did not exist prior to *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Maryland Attorney General Stephen H. Sachs, previously United States Attorney for the District of Maryland, recently underscored the relationship between the exclusionary rule and police training during his testimony before this Subcommittee in opposition to proposals which would create a "good faith" exception to the exclusionary rule:

"In my state, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years.

"Included in post-*Mapp* training are "much longer training periods for new officers, especially courses about constitutional rights," "in-service training, [which

was] virtually nonexistent before," a higher calibre of training, "training geared to practical situations such as stop and frisk exercises," and "testing constitutional law knowledge on promotional exams." Id.

Even proponents of a "good faith" exception concede that the exclusionary rule has accomplished "increased police training and awareness about their responsibilities." Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J. Crim. L. & Criminology 635, 656 (1978). Mertens and Wasserstrom illustrate the significance of a department's commitment to Fourth Amendment values, noting Delaware and Washington, D.C., police departmental changes in procedure in response to *Delaware* v. *Prouse*, 440 U.S. 648, (1979).

Observers of police practices have also noted a gradual acceptance of the exclusionary rule over time, as officers accustomed to more lax practices have either retired or come to accept the rule and new officers, unused to the old standard, have been hired and trained to function within the law. See, e.g., Mertens and Wasserstrom, supra, 70 Geo L. J. at 394–401.

The deterrent value of the exclusionary rule is also illustrated vividly by initial police reaction to *Mapp*. *Mapp* did not change substantive Fourth Amendment law one iota, yet in its wake then-New York City Police Commissioner Murphy argued that it had required total restructuring of his department's training procedures:

"I can think of no decision in recent times in the files of law enforcement which had such a dramatic and traumatic effect as this. . . . I was immediately caught up in the entire program of re-evaluating our procedures . . . and modifying, amending, and creating new policies and new instructions. . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen. . . ." Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments," 44 Tex. L. Rev. 939, 941 (1966).

Murphy's reaction to *Mapp* underscores the Supreme Court's crucial observation in that case that an exclusionary rule was necessary, in part, because without it, local police were simply not complying with the dictates of the Fourth Amendment. *Mapp* v. *Ohio*, supra, 367 U.S. at 657–658. It was the same observation that led the California Supreme Court to adopt an exclusionary rule six years earlier in *People* v. *Cahan*, 44 Cal. 2d 434, 282 P2d 905 (1955). Speaking of the evolution of his feelings on the matter, then-California Supreme Court Chief Justice Traynor explained:

"My misgivings about its admissibility [illegally obtained evidence] grew as I observed that time after time it was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent."

Nor has the onus of police illegality been shared equally throughout society. "[O]ur unexplained heritage of racism," McGowan, "Rule-Making and the Police," 70 Mich. L. Rev. 659, 669 (1972), has long been reflected in a higher incidence of illegal police conduct against racial minorities and has consequently been a chronic source of police-community tension in black and other minority communities. See, e.g., *Terry*, supra, 392 U.S. at 14. See also, United States Commission on Civil Rights, "Who is Guarding the Guardians? A Report on Police Practices" (1981). The effect of the exclusionary rule on police respect for citizens' legal rights in general has, for these reasons, been especially significant in increasing police awareness and acceptance of the constitutional rights of minorities.

Any weakening of the exclusionary rule would not help but send a dangerous message to the police, leading them to feel that "the Fourth Amendment is not a serious matter, if indeed it applies to them at all." Loewenthal, supra, 49 UMKC L. Rev. at 30:

"Moreover, police doubts are likely to be stronger now than they would be if the exclusionary rule had never been imposed. Since the rule has become functionally identified with the Fourth Amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the Fourth and Fourteenth Amendments, no matter what substitute remedies may be applied." Loewenthal, supra, 49 UMKC L. Rev. at 30.

Ball, too, concedes that, "A signal from the Court that it is abating its aggressive enforcement of Fourth Amendment requirements is apt to evoke a consistent response from the police." 69 J. Crim. L & Criminology at 656.

Simply stated, the symbolic impact of weakening or abandoning the exclusionary rule, as opposed to not adopting it in the first place, would be immeasurable. The exclusionary rule is extremely limited in its application: It is available only to individuals whose personal Fourth Amendment rights have been violated, *United States* v. *Saluucci*, 448 U.S. 83 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980); and it does not prevent the use of most illegally seized evidence before a grand jury, *United States* v. *Calandra*, 414 U.S. 338, (1974). It will also not prevent a person's prosecu-

tion when he or she has been constitutionally seized, *Frisbie* v. *Collins,* 342 U.S. 519, (1952), nor will it prevent the use of evidence discovered by means independent of police misconduct. Cf., e.g., *Wong Sun* v. *United States,* 371 U.S. 471, (1963).

The significance of these limitations should not be overlooked, for they confine the impact of the rule to those situations where (1) the government is a party (2) intending to use evidence obtained as a direct consequence of police illegality (3) as substantive proof (4) in a criminal proceeding (5) to which the rules of evidence apply (6) against an accused with a significant personal connection with the area searched or the item(s) seized.

Moreover, Fourth Amendment law is already flexible in taking into account an officer's objectively reasonable mistakes of fact: An officer's belief that certain facts exist will, if the facts would be sufficient to create probable cause, uphold a search or seizure, whether or not the facts later turn out to have existed, so long as the belief was objectively reasonable at the time. *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Henry* v. *United States,* 361 U.S. 98 (1959). Hearsay and rumor, if properly supported, may even be relied upon in order to establish probable cause. Cf., e.g., *Spinelli* v. *United States,* 393 U.S. 410 (1960); *Aguilar* v. *Texas,* 378 U.S. 108 (1964). Even in a search warrant situation, great deference is accorded a magistrate's determination of probable cause, and reversal will lie only if the magistrate's judgment has been "arbitrarily exercised," *United States* v. *Hatfield,* 599 F.2d 750, 761 (6th Cir. 1979).

Constitutional issues aside, changes in the exclusionary rule will have little impact on the crime problem. Hard evidence refutes the contention that hordes of criminals go free because of the rule.

Empirical evidence on the evidentiary costs of the exclusionary rule within the federal system also demonstrates that the rule has only extremely minimal impact on the results of criminal prosecutions. In a 1979 study of 2,804 defendant cases in 38 United States Attorney's offices, the General Accounting Office found that in less than half the cases involving a search or seizure was a motion to suppress even filed and that in only 1.3 percent of the defendant cases was evidence excluded as a result of the filing of a motion to suppress. "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," pp. 9–11. Even where a motion was granted in whole or in part, the rate of conviction remained over 50 percent (as compared with an 84 percent conviction rate in cases where motions had been denied). Id., at 13. Overall, a finding of illegal search and seizure resulted in dismissal or acquittal in only 0.7 percent of the cases studied. Moveover, in cases where prosecution was declined, search and seizure considerations played no part whatever in the decision not to prosecute in all but 0.4 percent of cases. Id., at 13–14.

Two other studies, one of prosecutions in Washington, D.C., and other cities by the Institute for Law and Social Research [Inslaw] and the other in New York City by the Vera Institute of Justice, provide further support. Inslaw found that while Fourth Amendment issues:

"May be substantial in terms of legal theory, they appear to have little impact on the overall flow of criminal cases after arrest." Geller, supra, 67 ABA J. at 1644.

The Vera Institute concluded further that the exclusionary rule "does not seem to produce dismissals in cases brought into the criminal process in which the searches are probably illegal and the evidence could be suppressed." Id. The Vera study also found that in many cases presenting potentially meritorious search and seizure questions, the parties compromised and settled on negotiated pleas to lesser charges.

The American Bar Association which "stongly supports retention of the exclusionary rule" on constitutional and practical grounds, has also concluded that the "rule is not responsible for hordes of criminals going free" and that "a dispassionate examination of the facts belies the mythology surrounding the rule." 67 ABA J. 1416 (1981).

A "good faith" exception to the exclusionary rule would weaken the Fourth Amendment, encourage police ignorance and be administratively unfeasible.

The proposed change would wreak havoc on the administration of criminal justice in this country. At a time when we are trying to reduce court costs and delays, introduction of a new "good faith" exception test will trigger years of litigation, as courts are forced to throw out well-developed case law. Additionally, by creating a lesser standard in federal courts, we would be destroying any semblance of uniformity in Fourth Amendment decisional law in federal and state criminal proceedings. Exclusionary rule changes will also undercut law enforcement professionalism, as reliance is placed on subjective "good faith" tests.

Allowing an officer's subjective belief that his or her conduct was lawful to govern the outcome of a suppression hearing or even be a factor in the decision would be fatal to the Fourth Amendment. The police are not neutral observers, and "in the heat of the chase, and in the absence of effective sanctions, I believe that we [police

and prosecutors] would define those [Fourth Amendment] rights, to put it mildly, somewhat narrowly." Sachs, supra.

Moreover, the balance between individual rights and the power of government depends not on an officer's subjective intent in a given case but on the balance of rights struck in the Constitution. Cf. *Dunaway* v. *New York,* 442 U.S. 300, 313-315, 99 S. Ct. 2248, 60 L. Ed. 2d 824, 836-837 (1979). See also *Whiteley* v. *Warden,* supra.

A "good faith" exception to the exclusionary rule would weaken Fourth Admendment protections not only by reducing the standard from one of objective probable cause to one of the officer's subjective belief, but also by certainly discouraging police training in constitutional rights. As Professor Kaplan has stressed, a "good faith" exception to the exclusionary rule:

. . . would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent." Kaplan, "The Limits of the Exclusionary Rule," 26 Stan. L. Rev. 1027, 1044 (1974).

Sachs agrees with this assessment. Ibid. See also Mertens and Wasserstrom, supra, 70 Geo. L.J. at 431; LaFave, supra, 43 Pitt. L. Rev. at 342-343.

Professor LaFave notes that Professor Schlesinger, an opponent of the exclusionary rule shares the belief:

". . . that the 'good faith' proposal 'provides little or no deterrence for violations deemed by the courts to be in good faith' because it fosters a 'careless attitude toward detail on the part of law enforcement officials' and encourages 'police to see what can be gotten away with before the courts draw the line on what is an intentional violation'." 43 Pitt. L. Rev. at 358 (quoting Schlesinger, "It is Time to Abolish the Exclusionary Rule," Wall Street Journal, September 10, 1981, at 24).

Judge Wilkey, another opponent of the exclusionary rule, also finds a "good faith" exception unpalatable, agreeing that "[t]he 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies." Wilkey, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," (National Legal Center for the Public Interest, 1982) at 36.

A "good faith" exception would also create an impossible administrative situation, requiring judges and defense attorneys to delve into the subjective intent of police officers whose self-serving words the former are unlikely to discount and the latter are unlikely to refute. Given the nature of the inquiry, an officer's personality and manner of address may have more to do with the outcome of a case than will the facts of the arrest or search involved.

Nor would litigation likely be confined to scrutinizing the subjective processes of individual officers. Rather, the entire training program of a department would be at issue in at least some cases, and in others involving more than one officer (by no means a rare occurrence), the various and possibly conflicting states of mind of numerous officers would be at issue. The result would be "an unabated waste of judicial resources." Wilkey, supra. See also LaFave, supra, 43 Pitt. L. Rev. at 355-357; Kaplan, supra, 26 Stan. L. Rev. at 1044-1045; Mertens and Wasserstrom, supra, 70 Geo L. J. at 447-449.

A "good faith" standard, necessarily involving a case-by-case approach, would also be extremely difficult to apply with any degree of consistency or uniformity. An analogous approach was rejected by the Court in *Irvine* v. *California,* 347 U.S. 128, 74 S.Ct. 381 (1954), where Justice Jackson, in his plurality opinion, "decline[d] to introduce vague and subjective distinctions" into rules for the administration of constitutional rights. 347 U.S. at 134. Justice Clark concurring, stressed:

"Of course, we could sterilize the rule announced in Wolf by adopting a case-by-case approach to due process in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution." 347 U.S. at 138.

While the Philadelphia Bar Association joins with the Administration and Congress in seeking an effective means of fighting crime, we oppose efforts to modify or abolish the exclusionary rule. In our view, such efforts are unconstitutional, unwarranted and unnecessary. The desire to adopt such "easy" solutions to the nation's serious crime problem will only result in abandonment of constitutional protections—but with very few additional criminals ending up behind bars.

Mr. CONYERS. The subcommittee stands adjourned.

[Whereupon, at 12:26 p.m., the subcommittee was adjourned.]

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